EDITOR'S NOTE

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(4)

PROCEEDINGS AND ORDERS DATE: 110785

CASE NBR 85-1-05046 CFY
SHORT TITLE Adams, Tyrone
VERSUS United States

DOCKETED: Jul 6 1985

Date	Proceedings and Orders
Jul 6 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Aug 13 1985	Order extending time to file response to petition until September 9, 1985.
Sep 10 1985	Order further extending time to file response to petition until September 20, 1985.
Sep 16 1985	Brief of respondent United States in opposition filed.
	VIDED.
Sep 19 1985	DISTRIBUTED. October 11, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Nov 4 1985	Petition DENIED. Dissenting opinion by Justice White with whom The Chief Justice joins. (Detached opinion.)
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EDITOR'S NOTE

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(1)

CASE NO. 85-5046

IN THE SUPREME COURT OF THE UNITED STATES

FALL TERM, 1985

UNITED STATES OF AMERICA,	CRIMINAL ACTION
VS.	
TYRONE ADAMS	

By Way of Petition For A Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Third Circuit

PETITIONER TYRONE ADAMS'
PETITION FOR A WRIT OF
CERTIORARI

Counsel of Record:

JOEL J. REINFELD, ESQ.
191 Main Street
P.O. Box 613
Hackensack, N.J. 07602
(201) 343-5297

82 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether an indictment under 21 U.S.C. § 843 (b) (1982) is fatally defective where it fails to specify the specific controlled substance involved in the facilitation count.

2. Whether 18 U.S.C. § 1962 (c) (1982) (the RICO conspiracy statute) requires the Government to prove that a defendant personally agreed to commit two or more predicate crimes.

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court pursuant to Sup.Ct. R. 20.1 & 20.4 as well as 28 U.S.C § 1254 (1) (1982), in that Petitioner's and his co-defendants' criminal convictions were affirmed by the United States Court of Appeals for the Third Circuit on April 15, 1985. Thereafter, on April 26, 1985, co-defendant Thomas DiDonato filed a Petition For Rehearing En Banc on April 26, 1985. On May 10, 1985, this Petition was denied by the entire Third Circuit. On May 17, 1985 co-defendant Joseph Mustacchio was granted permission by the Third Circuit to file his Petition For Rehearing En Banc. This Petition was denied by the entire Third Circuit on May 31, 1985. According to Rule 20.4 of this Court the filing of these Petitions tolled the time in which to file the present Petition. Petitioner now duly files his Petition For A Writ of Certiorari.

CONSTITUTIONAL PROVISIONS RELIED UPON

U.S. CONST. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ...nor be deprived of life, liberty, or property, without due process of law....

U.S.CONST. VI

In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation.....

STATUTORY PROVISIONS RELIED UPON

18 U.S.C.§ 1962 (c) (1982)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C.§ 1962 (d) (1982)

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

21 U.S.C.§ 843 (b) (1982)

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter....

21 U.S.C. § 846 (1982)

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On December 1, 1983, an indictment was filed in the United States District Court for the District of New Jersey against 45 individuals including the Petitioner, Tyrone Adams (A20). On December 15, 1983, a superseding indictment was filed in the same Court, which named an additional individual (A20a). Jurisdiction in the District Court was predicated upon 18 U.S.C. § 3231 (1982). The Petitioner was charged in Count One of the indictment with conspiring to violate the Racketeer Influence And Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (1982), in Count Two with a substantive RICO violation, id § 1962 (c), in Count Four with conspiracy to possess certain controlled substances with intent to distribute, 21 U.S.C. § 846, § 841 (a) (1) and in Counts 25 and 56 with utilizing a telephone to facilitate a drug conspiracy, id § 843 (b)(A3-19). The indictment alleged in Count Four that the Petitioner as well as the other Defendants concealed the drug activities by use of a charitable organization called "Concern for the Handicapped" (A17).

A jury trial commenced on April 4, 1984, and on May 14, 1984, Petitioner was found guilty on all counts. On June 26, 1984, Petitioner was sentenced to two years imprisonment on Counts One,Two and Four. Imposition of sentence on Counts 25 & 56 was suspended and Petitioner was placed on four years probation to be consecutive to the completion of his prison term. In addition, the two year sentence on Counts One, Two and Four were to run concurrently to each other (A21). Also on June 26, 1984, Petitioner was granted permission to appeal in forma pauperis (A2). That same day, Petitioner duly filed his Notice of Appeal to the United States Court of Appeals for the Third Circuit (A1). Jurisdiction in the Court of Appeals was predicated upon 28 U.S.C. § 1291 (1982). On April 15, 1985, Petitioners' and his co-defendants' convictions were affirmed

by the Third Circuit. United States v. Adams, 759 F.2d 1099 (3d Cir. 1985) (A229-47). Timely motions for rehearing were filed by co-defendants Thomas DiDonato and Joseph Mustacchio. The Third Circuit denied the latter's motion on May 31, 1985.

I. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT PETITIONER A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BECAUSE ITS RULING THAT AN INDICTMENT FOR VIOLATION OF 21 U.S.C. § 843 (b) (1982) IS NOT FATALLY DEFECTIVE WHERE THE INDICTMENT FAILS TO SPECIFY THE CONTROLLED SUBSTANCE INVOLVED DIRECTLY CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND DEPRIVES PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO BE FAIRLY INFORMED OF THE CHARGES AGAINST HIM.

Counts 25 and 56 of the Indictment charge the Petitioner with a substantive violation of 21 U.S.C. § 843 (b). As is required by law, Petitioner challenged the sufficiency of the Indictment prior to trial. Fed. R. Crim. P. 12(b) (2). More particularly, Petitioner challenged the sufficiency of the two telephone counts for failure to adequately allege the underlying offense (A221-28). Petitioner also challenged Count 2 of the Indictment, which charged a substantive violation of 18 U.S.C. § 1962 (c) (1982) ("RICO"), because that Count incorporated as predicate acts the defective telephone solicitation charges. Counts 25 and 56 except for differences in time frame and date are identical. Each charges that:

> In the District of New Jersey, the Defendants
> NICHOLAS VALVANO,
> a/k/a "Nicky Boy", and
> TYRONE ADAMS
> knowingly and intentionally did use and cause to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

(A18-19). In the District Court, Petitioner argued that the case of United States v. Hinkle, 637 F.2d 1154 (7th Cir. 1981), controlled. In that case, the Seventh Circuit held that:

> An indictment issued for violations of 21 U.S.C. § 843 (b) must specify the type of communication facility used, the date on which it was used, the controlled substance involved and some sort of statement of what is being facilitated with that controlled substance which constitutes a felony. See United States v. Bolin, 514 F.2d 554 (7th Cir. 1975).

> Without this crucial, minimal information, a defendant is deprived of ... (his) Sixth Amendment right to be apprised of the charges against ... (him), and ... (his) Fifth Amendment right to establish a record to defend against a possibility of double jeopardy.

Id. at 1158 (emphasis added) (A227). The District Court rejected this argument holding that the indictment was sufficient under this Court's holding in Hamling v. United States, 418 U.S. 87, 117 (1973) (A38). The Third Circuit thereafter affirmed the District Court's holding. United States v. Adams, 759 F.2d 1099, 1116-17 (3d Cir. 1985).

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecution, the accused shall enjoy the right ... to be informed of the nature and the cause of the accusation ....

U.S. CONST. AMEND. VI. The Fifth Amendment's guarantee of the right to indictment by a grand jury and its double jeopardy bar, and the Sixth Amendment's guarantee that a defendant be informed of the charges against him establish two minimum requirements for an indictment. Hamling v. United States, 418 U.S. at 117. The indictment must adequately apprise the defendant of the charge against him so that he can prepare his defense. The law is also well-settled that the Fifth Amendment requires that the indictment contain some amount of factual particularity to ensure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury. United States v. Roman, 728 F.2d 846, 854 (7th Cir. 1984); United States v. Abrams, 539 F. Supp. 378 (S.D.N.Y.)(1982). Furthermore, the indictment must establish a record that shows when the defense of double jeopardy may be available to a defendant in the event future proceedings are brought against him. Russell v. United States, 369 U.S. 749, 763-64 (1962); United States v. Schartner, 426 F.2d 470, 475-76 (3d Cir. 1970). As such, a defendant by way of a legally sufficient indictment is entitled to a definite written statement of the essential facts constituting the offense.

United States v. Bouye, 688 F.2d 471, 473 n.1 (7th Cir. 1982).

The Third Circuit misinterpreted this Court's holding in Hamling and should not have applied it to a drug facilitation count indictment for at least two reasons. First, Hamling is clearly distinguishable on its facts. In that case, the defendants were convicted of mailing and conspiring to mail an obscene advertising brochure with sexually explicit photographic materials in it. The indictment charged the defendants in the language of the particular obscenity statute. The defendant argued that the indictment was defective because the indictment itself did not relate the component parts of the definition of obscenity under the statute. This Court rejected this technical argument primarily on the ground that obscenity had a fixed legal definition. Hamling v. United States, 418 U.S. at 118. Second, and more important, this Court has been careful to point out that where guilt depends on a specific identification of fact the facts themselves must be spelled out. Russell v. United States, 369 U.S. 749 (1962). In Russell, the defendants had refused to answer questions that "were pertinent to the question then under inquiry" by a committee of Congress. In holding the indictment was insufficient because it did not state the subject which was under inquiry, this Court stated:

> (T)he very core of criminality under 2 U.S.C. § 192 ... is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute. Russell v. United States, 369 U.S. at 764 (emphasis added).

In a telephone facilitation count under 21 U.S.C. § 843 (b) the very "core of criminality" is the use of a telephone to facilitate some act involving a particular drug or drugs. As such, Hinkle was justifiably concerned that if the drug itself was not specified, the Government could "fill in the gaps" in

contravention of the Fifth Amendment Indictment Clause. The fact that the underlying offense facilitated was a conspiracy in this case as opposed to a substantive violation is immaterial. When a conspiracy is charged under 21 U.S.C. § 846 (1982), the indictment must allege with specificity the type of controlled substance involved. See United States v. Murray, 492 F.2d 178, 192 (9th Cir. 1973), cert. denied, 419 U.S. 854 (1974). Additionally, some controlled substance must necessarily be involved in the conspiracy charged under 21 U.S.C. § 846 (1982), otherwise there is no violation of the Federal Drug Laws. The Third Circuit's holding in this case, therefore, constitutes a significant departure from well-settled law and creates a direct split in the Circuits. A split in the Circuits on an issue so fundamentally important as this one cries out for resolution by the United States Supreme Court. Sup. Ct. R. 17. 1(a). This Court should therefore, grant Petitioner a Writ of Certiorari to review this pressing issue.

II. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT PETITIONER A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BECAUSE ITS HOLDING THAT PETITIONER COULD BE CONVICTED OF A RICO CONSPIRACY WITHOUT PERSONALLY AGREEING TO COMMIT TWO OR MORE PREDICATE ACTS CONTINUES TO PROPAGATE A CLEAR SPLIT OF AUTHORITY WITHIN THE CIRCUITS ON THIS ISSUE AND THE THIRD CIRCUIT'S DECISION HAD THE EFFECT OF DEPRIVING PETITIONER OF DUE PROCESS OF LAW BY ALLOWING HIM TO BE CONVICTED WITHOUT PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE WAS CHARGED.

Count 1 of the Indictment charged Petitioner and others with a RICO conspiracy. 18 U.S.C. § 1962 (d) (1982) (A3-8). Prior to trial, Petitioner submitted a proposed jury charge concerning the necessary elements to sustain a conviction for a RICO conspiracy (A186-88). In Petitioner's proposed charge, he requested that the District Court charge that, in order to convict Petitioner, the jury must find "(t)hat the Defendant knowingly

and intentionally agreed to participate in the affairs of the enterprise by personally committing two or more predicate acts" (A187). In a pretrial ruling, the District Court had already indicated its acceptance of United States District Judge Ackerman's ruling in the case of United States v. Local 560, 581 F.Supp. 279 (D.N.J. 1984), where the Court held that:

> I, therefore, conclude that a RICO "Enterprise" conspiracy may be established without personal conduct amounting to two personal predicate offenses. Instead, it is sufficient if the government demonstrates the agreement through the defendant's aiding and abetting in at least two such offenses or through assent through the commission by someone else or several others of at least two such offenses.

Id. at 331 (emphasis added) (A40-41). Based on Judge Ackerman's ruling, the District Court rejected Petitioner's proposed charge (A186-204) and gave the following instruction regarding knowledge:

> That the defendant knowingly and intentionally agreed to participate in the affairs of the enterprise through a pattern of rackateering activity.

(A191b). This instruction allowed the Jury to convict the Petitioner without a finding that he personally agreed to commit two or more predicate acts. The Third Circuit affirmed and held "(w)e now decide that to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts." United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985).

A clear split of authority exists on the issue of whether a defendant must agree to personally commit two or more predicate acts in order to be convicted of a RICO conspiracy. The Third, Eleventh and Ninth Circuits have held that 18 U.S.C. § 1962 (d) (1982) contains no such requirement. United States v. Adams, 759 F.2d at 1116; United States v. Carter, 721 F.2d 1514, 1529-31 (11th Cir.), cert. denied sub. nom. Morris v. United States, _____ U.S. _____, 105 S. Ct. 89 (1984); United States v. Brooklier, 685 F.2d 1208, 1220 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983). The Second, First and Fifth Circuits, whose

reasoning is much more persuasive, hold that one must personally agree to commit two or more predicate acts in order to be convicted of a RICO conspiracy. United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.) cert. denied sub. nom. Rabito v. United States, _____ U.S. _____, 105 S. Ct. 118 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); United States v. Elliot, 571 F.2d 880, 902 (5th Cir.), cert. denied, 439 U.S. 953 (1978). Thus, in United States v. Elliot, supra, the Fifth Circuit held:

> To be convicted as a member of an enterprise conspiracy an individual by his words or actions must have objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes.

Supra at 903. The Court, referring to the personal commission rule, then held that "(o)ne whose agreement with the members of an enterprise did not include this vital element cannot be convicted under the act." Id.; See United States v. Cauble, 706 F.2d 1322, 1341 (5th Cir. 1983), cert. denied, _____ U.S. _____ 104 S. Ct. 996 (1984). This reasoning is particularly persuasive because "the degree of criminal intent necessary for participating in a conspiracy must be at least equal to that required for the substantive offense itself." United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). The "personal commission" rule is, according to the Second Circuit, the prevailing view. United States v. Ruggiero, 726 F.2d at 921. In fact, the "personal commission" rule makes good policy sense. The First Circuit in adopting this rule stated: "(r)equiring one to knowingly join an enterprise and agree to commit two or more predicate crimes provides sufficient protection to those who might otherwise be convicted through guilt by association." United States v. Winter, 663 F.2d at 1136.

The instruction given to the jury by the District Court failed to spell out the requirement that, in order to convict Petitioner, the jury had to find an agreement to participate in the affairs of the enterprise by personally committing two or more predicate crimes. The Due Process Clause of the United States Constitution

protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. U.S. CONST. amend. V; In re Winship, 397 U.S. 358 (1970); United States v. Pine, 609 F.2d 106, 107 (3d Cir. 1979). The standard for determining when an error in a jury instruction requires reversal is the general standard for determining harmless error after objections by the defense. United States v. Lemire, 720 F.2d 1327, 1339 n. 16 (D.C. Cir. 1983), cert. denied, _____ U.S. _____ 104 S. Ct. 2678 (1984); see Hamling v. United States, 418 U.S. 87, 108 (1973). Under that standard, a court must reverse Petitioner's conviction unless it can say with fair assurance after pondering all that happened without stripping the erroneous actions from the whole, that the judgment was not substantially swayed by error. Kotteakos v. United States, 328 U.S. 750, 765 (1946). The District Court's instruction is only correct if the position of the Third, Ninth and Eleventh Circuits is correct. On the other hand, however, if the position adopted by the First, Second and Fifth Circuits is correct, as Petitioner contends, the Petitioner has been convicted without due process of law. Five times this Court has refused to deal with this issue and has denied Certiorari. The issue has now been decided by six Courts of Appeals and has produced an even split of authority. The time has come for this Court to lend its guidance. As such, this Court should grant Petitioner a Writ of Certiorari to review this issue.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof,it is respectfully requested that this Court grant Petitioner a Writ for Certiorari to the Supreme Court of the United States in order that the judgment of the United States Court of Appeals for the Third Circuit may be reviewed by this Court.

Respectfully submitted,

Joel J. Reinfeld

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ATTORNEY FOR PETITIONER

[redacted]

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NOTICE OF APPEAL

TO

U. S. COURT OF APPEALS, THIRD CIRCUIT

[x] U.S. DISTRICT COURT DISTRICT OF NEW JERSEY (District/State) NEWARK (Location)

[ ] U.S. TAX COURT

CIRCUIT COURT DOCKET NO. _____ (leave blank)

FULL CAPTION IN DISTRICT COURT AS FOLLOWS:

DISTRICT or TAX COURT DOCKET NO. CR. NO. 83-351

United States of America,

v.

DISTRICT or TAX COURT JUDGE _____

Tyrone Adams, Thomas DiDinato, a/k/a "Big Tommy", Clifton Brooks, a/k/a "Shotsie", Nicholas Gallicchio, a/k/a "Monk", John Hairston, a/k/a "Rip", Anthony Alongi, Dominick DeLuca, Michael Viscito, a/k/a "Morgan", Joesph Mustacchio, a/k/a "Joe Mustache", and Stuart Schoenwetter, a/k/a "Stu Rick".

Defendants.

FILED

JUN 26 1984

AT 8 10:30 A.M.

WILLIAM T. WALSH, CLERK

Notice is hereby given that TYRONE ADAMS (Named Party)

appeals to the United States Court of Appeals for the Third Circuit from [x] Judgment [ ] Order [ ] Other (Specify) _____

entered in this action on JUNE 26, 1984 (Date)

DATED: June 26, 1984

Joel J. Reinfeld
(Counsel for Appellant-Signature)

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IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

United States of America	)	
	)	
v.	)	CR. NO. 83-351
	)	
Nicholas Valvano, a/k/a "Nicky Boy", (and 45 other Defendants),	)	JUDGE DICKINSON DEBEVOISE

ORDER

CAME ON for consideration Defendant TYRONE ADAMS' Motion For Leave To Appeal In Forma Pauperis, pursuant to Rule 24 (a) of the Federal Rules of Appellate Procedure. The Court having considered the Motion and the grounds in support thereof,

IT IS ORDERED that Defendant TYRONE ADAMS' Motion is hereby GRANTED.

DONE at Newark, New Jersey, this 26th day of June, 1984.

DICKINSON R. DEBEVOISE
United States District Judge

JUN 26 1984
10:30 A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 83-351
v.	:	21 U.S.C. §§841(a)(1), 843(b), 846 & 848
NICHOLAS VALVANO, a/k/a "Nicky Boy,"	:	18 U.S.C. §§2, 924(c) 1962(c), 1962(d) & App. I §1202(a)(1)
STANLEY BUGLIONE	:	26 U.S.C. §§5845, 5861 & 5871
GLENN DELAMOTTE,	:	
ALBERT SUPPA, a/k/a "Moose,"	:	
PHILLIP CARDINALE, a/k/a "Bear,"	:	
LLOYD CUTRUFELLO,	:	
MICHAEL SUTTER, a/k/a "Mickey,"	:	
DINO ACCARIA,	:	
PENNELL RICHARD AMIS, a/k/a "Richie,"	:	
DOROTHY KRAUS, a/k/a "Connie,"	:	
DAVID BISHOP,	:	
JOHN PATRICK ARENZ, a/k/a "Jack,"	:	
HELEN CARNEY,	:	
TYRONE ADAMS,	:	
DOMINICK DiNORSCIO, a/k/a "Tommy Adams,"	:	
THOMAS DiDONATO, a/k/a "Big Tommy,"	:	
MARIO RUSSO,	:	
JOSEPH LEMMO,	:	
MATTHEW McELHANEY,	:	
KENNETH BORRE, a/k/a "Stacks,"	:	
CLIFTON BROOKS, a/k/a "Shotsie,"	:	
NICHOLAS GALLICCHIO, a/k/a "Monk,"	:	
ANTHONY GRASSO, a/k/a "Butchie,"	:	
JACK RACKOVER, a/k/a "Rocky,"	:	
JOSEPH ACCARIA,	:	
JOHN HAIRSTON, a/k/a "Rip,"	:	
JOSEPH CAVICO,	:	
ANTHONY ALONGI,	:	

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ANTHONY D'AMBOLA, a/k/a "Sneaks," :
FRANCES GRASSO, a/k/a "Frankie," :
JOHN CAMMARATA, :
DANIEL CARDINALE, :
ROBERT DELAMOTTE, a/k/a "Blackjack Bobby," :
ROBERT DEL MAURO, :
PHYLLIS PALMIERI, :
DOMINICK DeLUCA, :
MICHAEL VISCITO, a/k/a "Morgan," :
DANA GRIFFITH, :
JOSEPH MUSTACCHIO, a/k/a "Joe Mustache," :
SALVATORE PIZZI, :
JAMES REGESTER, :
STUART SCHOENWETTER, a/k/a "Stu Rick," :
KAREN PAULES, :
RUSSELL CONBOY, :
THOMAS SIMONE, and :
ALICIA ADAMS :

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT 1

1. During the period encompassed by this Indictment, the defendants Nicholas Valvano, a/k/a "Nicky Boy," Stanley Buglione, Glenn Delamotte, and Albert Suppa, a/k/a "Moose," supervised and managed an organization, consisting of a large number of individuals, responsible for the distribution of large quantities of controlled substances, including cocaine, methamphetamine ("speed"), dilaudid ("synthetic heroin"), and diazepam, throughout New Jersey, New York City and elsewhere. From at least August, 1983 and continuing up to November 22, 1983, these defendants and others working for them used the premises located at 79 Davenport

Avenue, Newark, New Jersey, as a clearinghouse for the distribution of these drugs.

2. In August, 1983, in order to conceal the true nature of their illicit activities, Valvano and others represented to the public that the premises at 79 Davenport Avenue constituted the place of business of a charitable organization called "Concern for the Handicapped." Pursuant to that end, Valvano caused the telephones at 79 Davenport Avenue to become subscribed in the name of "Concern for the Handicapped" and arranged for many of the incoming calls into the premises, including those relating to narcotics trafficking, to be answered in the name of the charity. In addition, Valvano arranged for the opening of various bank accounts in the name of "Concern for the Handicapped," located at the above premises, and through the means of news media and otherwise, he represented that at 79 Davenport Avenue significant services for handicapped individuals were being carried out. Moreover, during various times relevant to this Indictment, Valvano attempted to recruit and did recruit other individuals, many of whom were involved with him in drug trafficking, to open other "Concern for the Handicapped" chapters throughout the State of New Jersey and elsewhere.

3. The defendants Valvano, Buglione, Delamotte and Suppa supervised a substantial network of drug suppliers and distributors. A number of defendants, including but not limited to John Patrick Arenz, a/k/a "Jack," Thomas DiDonato, a/k/a "Big Tommy," and Jack Rackover, a/k/a "Rocky," supplied drugs to these

individuals. Numerous other defendants, including but not limited to Phillip Cardinale, a/k/a "Bear," Dino Accaria, Joseph Accaria, Pennell Richard Amis, a/k/a "Richie," Lloyd Cutrufello, Michael Sutter, a/k/a "Mickey," Mario Russo, Joseph Lemmo, Tyrone Adams, Anthony Grasso, a/k/a "Butchie," Michael Viscito, a/k/a "Morgan," Dominick DiNorscio, a/k/a "Tommy Adams," Clifton Brooks, a/k/a "Shotsie," John Hairston, a/k/a "Rip," Nicholas Gallicchio, a/k/a "Monk," Joseph Cavico, Anthony Alongi, Anthony D'Ambola, a/k/a "Sneaks," Robert Del Mauro, James Regester, Stuart Schoenwetter, a/k/a "Stu Rick," Russell Conboy, Thomas Simone and Karen Paules were distributors of various controlled substances on behalf of Valvano, Buglione, Delamotte and Suppa. Anthony Grasso, a/k/a "Butchie," also acted as a "collection agent" for drug proceeds for the enterprise and used extortionate means to obtain drug monies due and owing the principals at 79 Davenport Avenue.

4. In addition, the defendant Dominick DeLuca ordered and supplied large quantities of precursor chemicals used in the clandestine synthesis of methamphetamine which was ultimately supplied to Valvano, Buglione, Delamotte and Suppa at 79 Davenport Avenue by John Patrick Arenz, a/k/a "Jack." Moreover, the defendants Robert Delamotte, a/k/a "Blackjack Bobby," Dorothy Kraus, a/k/a "Connie," David Bishop, Frances Grasso, a/k/a "Frankie," Dana Griffith, Helen Carney, Matthew McElhaney, Kenneth Borre, a/k/a "Stacks," Daniel Cardinale, Salvatore Pizzi, John Cammarata, Joseph Mustacchio, a/k/a "Joe Mustache," Phyllis Palmieri and Elicia Adams aided and assisted various other defendants identified above in the storage and distribution of drugs.

5. These defendants and others constituted an "enterprise," as defined by Title 18, United States Code, Section 1961(4), that is, a group of individuals associated in fact to commit acts involving Title 21, United States Code, Sections 841(a)(1) (relating to the distribution and possession with intent to distribute of controlled substances), 843(b) (relating to the use of telephones to facilitate drug transactions), 846 (relating to conspiracy to manufacture, distribute and possess with intent to distribute controlled substances), 848 (relating to engaging in a continuing criminal enterprise), and Title 2C, New Jersey Code of Criminal Justice, Section 20-5 (involving extortion).

6. That from May, 1983, and continuously thereafter up to November 22, 1983, said dates being approximate and inclusive, at Newark, in the District of New Jersey, and elsewhere, the defendants

NICHOLAS VALVANO,
a/k/a "Nicky Boy,"
STANLEY BUGLIONE,
GLENN DELAMOTTE,
ALBERT SUPPA,
a/k/a "Moose,"
PHILLIP CARDINALE,
a/k/a "Bear,"
LLOYD CUTRUFELLO,
MICHAEL SUTTER,
a/k/a "Mickey,"
DINO ACCARIA,
JOSEPH ACCARIA,
PENNELL RICHARD AMIS,
a/k/a "Richie,"
JOHN PATRICK ARENZ,
a/k/a "Jack,"
TYRONE ADAMS,
MARIO RUSSO,
ANTHONY GRASSO,
a/k/a "Butchie,"
JOSEPH LEMMO,
DOMINICK DeLUCA,
MICHAEL VISCITO,
a/k/a "Morgan,"

and others known and unknown to the Grand Jury, being employed by (and) associated with the above-described criminal enterprise, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to conduct and participate, directly and indirectly, in the affairs of that enterprise, which was engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity, consisting of the acts set forth in Counts 3 and 6 through 62 inclusive and extortion under New Jersey State Law, all of which are incorporated by reference herein and are listed and set forth on pages 8 through 12 of this Indictment, contrary to Title 18, United States Code, Section 1962(c).

In violation of Title 18, United States Code, Section 1962(d).

COUNT 2

1. Paragraphs 1 through 5 inclusive of Count 1 of this Indictment are hereby realleged and incorporated as though fully set forth herein.

2. That from May, 1983, and continuously thereafter up to November 22, 1983, said dates being approximate and inclusive, at Newark, in the District of New Jersey, and elsewhere, the defendants

NICHOLAS VALVANO,
a/k/a "Nicky Boy,"
STANLEY BUGLIONE,
GLENN DELAMOTTE,
ALBERT SUPPA,
a/k/a "Moose,"
PHILLIP CARDINALE,
a/k/a "Bear,"
LLOYD CUTRUFELLO,
MICHAEL SUTTER,
a/k/a "Mickey,"
DINO ACCARIA,
JOSEPH ACCARIA,
PENNELL RICHARD AMIS,
a/k/a "Richie,"
JOHN PATRICK ARENZ,
a/k/a "Jack,"
TYRONE ADAMS,
MARIO RUSSO,
ANTHONY GRASSO,
a/k/a "Butchie,"
JOSEPH LEMMO,
MICHAEL VISCITO,
a/k/a "Morgan,"

and others known and unknown to the Grand Jury, being employed by (and) associated with the above-described criminal enterprise, did unlawfully, wilfully and knowingly conduct and participate, directly and indirectly, in the affairs of that enterprise which was engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity

consisting of the acts set forth in Counts 3 and 6 through 62 inclusive and extortion under New Jersey State Law, all of which are incorporated by reference herein and are listed and set out below as follows:

3. DEFENDANT	PATTERN OF RACKETEERING ACTIVITY
NICHOLAS VALVANO a/k/a "Nicky Boy"	(1) Count 3: 21 U.S.C. §848 (engaging a continuing criminal enterprise)
	(2) October 6, 1983 seizure of methamphetamine, consisting of Counts 6, 40 & 43
	(3) October 20, 1983 seizure of methamphetamine, consisting of Counts 7, 50, 52 & 55
	(4) November 22, 1983 seizure of drugs at 232 Bowers Street, consisting of Counts 11 and 12
	(5) November 22, 1983 seizure of drugs at 20 Belmont Avenue, consisting of Counts 13 and 14
	(6-8) Counts 8 through 10: 21 U.S.C. §841(a)(1) (distribution and possession with intent to distribute of controlled substances) (3 counts)
	(9-16) Counts 19, 20, 25, 29, 31, 32, 34 and 56: 21 U.S.C. §843(b) (using a telephone to facilitate a drug transaction) (8 counts)
STANLEY BUGLIONE	(1) Count 3: 21 U.S.C. §848
	(2) October 6, 1983 seizure of methamphetamine, consisting of Counts 6 & 42
	(3) October 20, 1983 seizure of methamphetamine, consisting of Counts 7, 50, 51, & 52

	(4) November 22, 1983 seizure of drugs at 232 Bowers Street, consisting of Counts 11 and 12
	(5) November 22, 1983 seizure of drugs at 20 Belmont Avenue, consisting of Counts 13 and 14
	(6-8) Counts 8 through 10: 21 U.S.C. §841(a)(1) (3 counts)
	(9-16) Counts 16, 17, 44, 45, 46, 47, 53 and 58: 21 U.S.C. §843(b) (8 counts)
GLENN DELAMOTTE	(1) Count 3: 21 U.S.C. §848
	(2) October 6, 1983 seizure of methamphetamine, consisting of Counts 6, 36, 38, 39, 41 & 42
	(3) November 22, 1983 seizure of drugs at 232 Bowers Street, consisting of Counts 11 and 12
	(4) November 22, 1983 seizure of drugs at 20 Belmont Avenue, consisting of Counts 13 and 14
	(5-8) Counts 7 through 10: 21 U.S.C. §841(a)(1) (4 counts)
	(9-13) Counts 15, 19, 28, 32, and 59: 21 U.S.C. §843(b) (5 counts)
ALBERT SUPPA, a/k/a "Moose"	(1) Count 3: 21 U.S.C. §848
	(2) October 6, 1983 seizure of methamphetamine, consisting of Counts 6, 35, 36, 37, 38, 39, 40 & 41
	(3) October 20, 1983 seizure of methamphetamine, consisting of Counts 7, 49, 51, 52 & 54

	(4)	November 18, 1983 sale of cocaine, consisting of Counts 10 and 62
	(5)	November 22, 1983 seizure of drugs at 232 Bowers Street, consisting of Counts 11 and 12
	(6)	November 22, 1983 seizure of drugs at 20 Belmont Avenue, consisting of Counts 13 and 14
	(7-9)	Counts 8 through 10: 21 U.S.C. §841(a)(1) (3 counts)
	(10-18)	Counts 18, 21, 22, 27, 30, 48, 57, 59, and 60: 21 U.S.C. §843(b) (9 counts)
PHILLIP CARDINALE, a/k/a "Bear"	(1)	October 6, 1983 seizure of methamphetamine, consisting of Counts 6, 35, 37, & 43
	(2-3)	Counts 28 & 33: 21 U.S.C. §843(b) (2 counts)
LLOYD CUTRUFELLO	(1-3)	Counts 17, 34 and 58 21 U.S.C. §843(b) (3 counts)
DINO ACCARIA	(1)	November 18, 1983 sale of cocaine, consisting of Counts 10 and 62
	(2)	Count 8: 21 U.S.C. § 841(a)(1)
	(3-4)	Counts 22 & 26: 21 U.S.C. §843(b) (2 Counts)
JOSEPH ACCARIA	(1-2)	Counts 8 and 10: 21 U.S.C. §841(a)(1) (2 counts)
JOHN PATRICK ARENZ a/k/a "Jack"	(1)	October 20, 1983 seizure of methamphetamine, consisting of Counts 7 & 49
	(2)	Count 18: 21 U.S.C. §843(b)

PENNELL RICHARD AMIS, a/k/a "Richie"	(1-2)	Counts 30 and 48: 21 U.S.C. §843(b) (2 counts)
TYRONE ADAMS	(1-2)	Counts 25 and 56 : 21 U.S.C. §843(b) (2 counts)
MARIO RUSSO	(1)	November 22, 1983 seizure of drugs at 20 Belmont Avenue, consisting of Counts 13 and 14
	(2)	Count 9: 21 U.S.C. §841(a)(1)
	(3-4)	Counts 47 and 53: 21 U.S.C. §843(b) (2 counts)
MICHAEL SUTTER, a/k/a "Mickey"	(1-2)	Counts 15 and 20: 21 U.S.C. §843(b) (2 counts)
ANTHONY GRASSO, a/k/a "Butchie"	(1)	Telephone calls of August 25 and 27, 1983 consisting of Counts 23 and 24 and extortion under New Jersey law, as set forth on this and the next page of Indictment.
	(2)	Count 26: 21 U.S.C. §843(b)
JOSEPH LEMMO	(1-2)	Counts 16 and 46: 21 U.S.C. §843(b) (2 counts)
MICHAEL VISCITO, a/k/a "Morgan"	(1-2)	Counts 52 and 59: 21 U.S.C. §843(b) (2 counts)

In addition to the foregoing federal crimes pleaded as part of the pattern of racketeering activity, the following violation of New Jersey State Law is included:

From on or about August 25 to on or about August 27, 1983, at Newark, in the State of New Jersey, the defendant

ANTHONY GRASSO,
a/k/a "Butchie,"

did purposely and unlawfully attempt to obtain money of another, to wit, Charles Zicaro, by purposely threatening to inflict bodily injury on him, contrary to Title 2C, New Jersey Code of Criminal Justice, Sections 20-5 and 5-1.

In violation of Title 18, United States Code, Section 1962(c).

COUNT 4

1. That from May, 1983, and continuously thereafter up to November 22, 1983, said dates being approximate and inclusive, at Newark, in the District of New Jersey, and elsewnere, the defendants,

NICHOLAS VALVANO,
a/k/a "Nicky Boy,"
STANLEY BUGLIONE
GLENN DELAMOTTE,
ALBERT SUPPA,
a/k/a "Moose,"
PHILLIP CARDINALE,
a/k/a "Bear,"
LLOYD CUTRUFELLO,
MICHAEL SUTTER,
a/k/a "Mickey,"
DINO ACCARIA,
PENNELL RICHARD AMIS,
a/k/a "Richie,"
DOROTHY KRAUS,
a/k/a "Connie,"
DAVID BISHOP,
JOHN PATRICK ARENZ,
a/k/a "Jack,"
HELEN CARNEY,
TYRONE ADAMS,
DOMINICK DiNORSCIO,
a/k/a "Tommy Adams,"
THOMAS DiDONATO,
a/k/a "Big Tommy,"
MARIO RUSSO,
JOSEPH LEMMO,
MATTHEW McELHANEY,
KENNETH BORRE,
a/k/a "Stacks,"
CLIFTON BROOKS,
a/k/a "Shotsie,"
NICHOLAS GALLICCHIO,
a/k/a "Monk,"
ANTHONY GRASSO,
a/k/a "Butchie,"
JACK RACKOVER,
a/k/a "Rocky"

JOSEPH ACCARIA,
JOHN HAIRSTON,
a/k/a "Rip,"
JOSEPH CAVICO,
ANTHONY ALONGI,
ANTHONY D'AMBOLA,
a/k/a "Sneaks,"
FRANCES GRASSO,
a/k/a "Frankie,"
JOHN CAMMARATA,
DANIEL CARDINALE,
ROBERT DELAMOTTE,
a/k/a "Blackjack Bobby,"
ROBERT DEL MAURO,
PHYLLIS PALMIERI,
DOMINICK DeLUCA,
MICHAEL VISCITO,
a/k/a "Morgan,"
DANA GRIFFITH,
JOSEPH MUSTACCHIO,
a/k/a "Joe Mustache,"
SALVATORE PIZZI,
JAMES REGESTER,
STUART SCHOENWETTER,
a/k/a "Stu Rick,"
KAREN PAULES,
RUSSELL CONBOY,
THOMAS SIMONE,
ALICIA ADAMS,

and others known and unknown to the Grand Jury did knowingly and wilfully combine, conspire, confederate and agree to distribute and possess with intent to distribute quantities of narcotic drug controlled substances and controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

2. It was part of said conspiracy that the defendants and others would knowingly and intentionally distribute and possess with intent to distribute quantities of cocaine hydrochloride, a Schedule II narcotics drug controlled substance.

3. It was further part of said conspiracy that the defendants and others would knowingly and intentionally distribute and possess with intent to distribute quantities of dilaudid, a Schedule II narcotic drug controlled substance.

4. It was further part of said conspiracy that the defendants and others would knowingly and intentionally distribute and possess with intent to distribute quantities of methamphetamine, a Schedule II controlled substance.

5. It was further part of said conspiracy that the defendants and others would knowingly and intentionally distribute and possess with intent to distribute quantities of diazepam, a Schedule IV controlled substance.

6. It was further part of said conspiracy that the defendants and others would take steps designed to conceal their drug activities by, among other means, the use of a charitable organization called "Concern for the Handicapped."

In violation of Title 21, United States Code, Section 846.

COUNT 25

That at approximately 6:21 p.m. on August 30, 1983, at Newark, in the District of New Jersey, the defendants

NICHOLAS VALVANO,
a/k/a "Nicky Boy," and
TYRONE ADAMS

knowingly and intentionally did use and caused to be used a communication facility, that is, a telephone, in facilitating a knowing and wilfull conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

In violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 56

That at approximately 9:23 a.m. on October 24, 1983, at Newark, in the District of New Jersey, the defendants

NICHOLAS VALVANO,
a/k/a "Nicky Boy," and
TYRONE ADAMS

knowingly and intentionally did use and caused to be used a communication facility, that is, a telephone, in facilitating a knowing and wilfull conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

In violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

[redacted]

Yr.	Docket No.	Def.
83	00351	45

MASTER DOCKET - MULTIPLE DEFENDANT CA
PROCEEDINGS DOCKET FOR SINGLE DEFENDANT
PAGE ___ OF ___

VI EXCLUDABLE DELAY

V. PROCEEDINGS

[illegible]	[illegible]	Complaint filed - (Haneke)
[illegible]		Warrant of Arrest issued - (Haneke)
[illegible]		Sealing Order sealing Complaint & Warrant of Arrest until such time as the Warrant of Arrest can be executed, filed - (Haneke)
[illegible]		Initial appearance before Magistrate - (Haneke)
[illegible]		Rule 5 - (Haneke)
[illegible]		Preliminary hearing scheduled for 12-2-83 at 12 Noon - (Haneke)
[illegible]		Ordered def. remanded in lieu of posting $7,500 surety with 10% cash alternative - (Haneke)
[illegible]	[illegible]	Order of Release, filed - (Haneke)
[illegible]		Commitment issued - (Haneke)
[illegible]		Bail-Release before Magistrate - (Haneke)
[illegible]		Appearance Bond executed with $750 posted by Victoria Blanch, 63 Summit Ave., Cedar Knolls, N.J. 07927, 10% of bail set - (Haneke)
[illegible]	[illegible]	Warrant of Arrest returned executed - (Haneke)
[illegible]	185	INDICTMENT FILED. SEE CRIM. 83-00351-01

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[redacted]

...ED STATES DISTRICT CO...
...AL DOCKET U.S. vs NICHOLAS VALVANO

A-20a

Yr.	Docket No.	Def.
83	00351	01

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
[illegible]-9-83	NICHOLAS VALVANO, ET AL. - Letter order re schedule of proceedings filed 12-8-83. (Debevoise)				
[illegible]-12-83	CLIFTON RAYMOND BROOKS - Hearing on motion of def. to reduce bail- (Haneke)				
[illegible]-12-83	Clifton Raymond Brooks - Ordered bail reduced to $50,000 surety with 10% cash alternative - (Haneke)				
[illegible]-13-83	NICHOLAS VALVANO, ET AL. - Transcript of proceedings held on 11-22-83 filed 12-12-83.				
[illegible]-13-83	NICHOLAS VALVNO, ET AL. - Transcript of proceedings held on 11-29-83 filed 12-12-83.				
[illegible]-13-83	JACK RACKOVER - Order denying motion of defendant for reduction of bail filed 12-12-83. (Haneke)				
[illegible]-13-83	ALBERT SUPPA - Order denying application of defendant for reduction of bail filed 12-12-83. (Haneke)				
[illegible]-13-83	NICHOLAS GALLICCHIO - Hearing on motion of def. to reduce bail - (Haneke)				
[illegible]-13-83	NICKOLAS GALLICCHIO - Ordered motion to reduce bail DENIED - (Haneke)				
[illegible]-13-83	JOHN P. ARENZ - Bail-Release before Magistrate - (Haneke)				
[illegible]-13-83	JOHN P. ARENZ - Def. waived rights under Rule 44 of Fed. Rules of Crim. Procedure - (Haneke)				
[illegible]-13-83	JOHN P. ARENZ - Nebbia Hearing - (Haneke)				
[illegible]-13-83	JOHN P. ARENZ - Appearance bond executed with posting of $10,000 by William Arenz, 8 West Summerfield Ave., Collingswood, N.J. and William Arenz & Helen Carney signing as surety - (Haneke)				
[illegible]-15-83	NICHOLAS VALVANO, ET AL. - Superseding Indictment filed.				
[illegible]-15-83	NICHOLAS VALVANO, ET AL. - Notice of allocation and assignment fixing 12-16-83 for arraignment filed.(Newark-Debevoise)				
[illegible]-15-83	GLENN DELAMOTTE - Application for issuance of bench warrant granted.				
[illegible]-15-83	ALICIA ADAMS - Application for issuance of bench warrant granted.				
[illegible]-15-83	GLENN DELAMOTTE - Bench warrant issued.				
[illegible]-15-83	ALICIA ADAMS - Bench warrant issued.				
[illegible]-20-83	ALICIA ADAMS - Hearing on application of defendant for appointment of counsel. Ordered application granted. Ordered James J. Plaia, Esq. appointed as counsel. Ordered bail set at $10,000.00 personalrecognizance. Ordered arraignment date set for 12-16-83 at 9:30 A.M. before Judge Debevoise. (Cowen) (12-15-83)				
[illegible]-20-83	TYRONE ADAMS - Order denying application of defendant for reduction of bail filed 12-13-83. (Haneke)				
[illegible]-20-83	ALICIA ADAMS - Order fixing bail at $10,000.00 personal recognizance filed 12-15-83. (Cowen)				
[illegible]-20-83	ALICIA ADAMS - Warrant for arrest returned executed on 12-15-83 filed 12-15-83.				
[illegible]-20-83	TYRONE ADMAS - Notice of motion of defendant for reduction of bail and proof of service filed 12-15-83. (brief submitted) (See Entry #219)				
[illegible]-20-83	PENNELL RICHARD AMIS, DOROTHY CONNIE KRAUS, KAREN PAULES, JOHN GALDIERI - Transcript of proceedings held on 11-29-83 filed 12-15-83.				

Interval (per Section III) | Start Date / End Date | Ltr. Code | Tor. De...

STATES DISTRICT COUR
AL DOCKET

A-21

AO 256A

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
-84	LLOYD CUTRUFELLO - SENTENCE: 6 yrs Ct. 4. 8-6-84 voluntary surrender date. Ordered all other counts dismissed. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	MICHAEL SUTTER - SENTENCE: 3 yrs ct. 4. Execution of sentence stayed until 9-24-84 which is voluntary surrender date. Insitutution to be designated. Ordered all other cts. dismissed. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	DINO ACCARIA - SENTENCE: 12 yrs Ct. 1. Ordered all other cts. dismised. (Debevoise) (6-26-84)				
-84	DOROTHY KRAUS - SENTENCE: 2 yrs Ct. 61, condition deft. confined to jail type or treatment facility for 6 months. Execution of remainder sentence suspended & probation 4 yrs. Execution sentence stayed until 8-6-84 which is voluntary surrender date to designated facility. Special condition probation, deft. shall refrain from illegal drug abuse & submit to durg treatment, in patient or out patient, at discretion of US Prob. & undergo urine monitoring. Ordered bail cont'd (Debevoise) (6-26-84)				
-84	TYRONE ADAMS - SENTENCE: 2 yrs Cts 1,2,4. Imposition of sentnece on Cts. 25 & 26 suspended & probation 4 yrs. to be consecutive to completion of sentence on Cts 1,2,4. The 2 yr term of imprison ments on Cts 1,2,4 to run concurrently to each other. Sentence stayed pending appeal. Ordered all other Cts dismissed. Special condition of probation, deft to refrain from illegal drug abuse & to submit to drug treatment, in patient or out patient, at discretion of US Probation & undergo urine monitoring. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	THOMAS DIDONATO - SENTENCE: 12 yrs Ct 4. Sentence stayed pending appe Ordered all other Cts. dismissed. Ordered bail cont'd. (Debevois (6-26-84).				
-84	MARIO RUSSO JR. - SENTENCE: 5 yrs Ct 1 on condition deft. be confined jail type institution for 6 months, execution of remainder of sentence suspended & probation 5 yrs., to commence upon release from confinement. Voluntary surrender is stayed to 8-6-84. Ordered all other Cts dismissed. Ordered bail cont'd. (Debevois (6-26-84)				
-84	CLIFTON BROOKS - SENTENCE: 9 yrs Ct. 4. Sentence stayed pending appeal. Ordered all other Cts. dismissed. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	JOHN HAIRSTON - SENTENCE: 8 yrs Ct. 4. Sentnece stayed pending appeal. Ordered all other Cts dismissed. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	ANTHONY GRASSO - SENTENCE: 1 yr Ct. 1. Sentnece stayed until 8-6-84. Ordered all other Cts. dismiseed. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	JACK RACKOVER - SENTENCE: 3 yrs Ct 4. Sentence stayed until 8-6-84. Ordered all other Cts. dismissed. Ordered bail cont'd. (Debevoise) (6-26-84)				
-84	JOSEPH ACCARIA - SENTENCE: suspended on Ct. 4 & probation 5 yrs. Ordered all other Cts. dismissed. (Debevoise) (6-26-84)				
-84	JOSEPH J. CAVICO - SENTENCE: 4 yrs on superseding information. Execution sentence suspended & probation 4 yrs. Ordered all Other Cts. dismissed. Special condition probation deft. to resid & participate in Institute for Human Development Theraputic Community in Atlantic City at direction of US Probation. Deft to report before 6-29-84. Ordered bail cont'd. (Debevoise) (6-26-84)				

Interval (per Section III) | Start Date / End Date | Ltr Code | Total Days

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conspiracy to distribute and possess with intent to distribute. Those counts do not charge which controlled substances were the object of the conspiracy.

The government seeks to distinguish Hinkin, arguing: "In this case .. the charge is facilitation of a conspiracy - a partnership in crime - that had multiple objectives: The distribution and possession with intent to distribute controlled substances. Which controlled substances - a matter of significance under Section 841(a)(1) - is irrelevant in terms of of a Section 843(b) charge of facilitating a broader conspiracy."

As a general principle "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and, second, enables him to plead an acquittal or conviction in bar of a future prosecution for the same offense... It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence to be punished." Hamling v. United States 418 U.S. 87, 117 (1974).

It is unnecessary to decide whether in this Circuit the particular controlled substance must be specified in an indictment charging use of a telephone to facilitate,

manufacture, distribution or dispensing. Where the gravamen of the charge is a conspiracy to distribute and possess I think omission of the kinds of controlled substances in which the conspirators dealt does not render the indictment defective. Even without that information sufficient notice is given to a defendant so that he can prepare his defense and avoid a future charge for the same offense.

Adams' motion to dismiss Counts 25 and 26 shall be denied.

Having concluded these counts are not defective, it necessarily follows that Adams motion to dismiss Counts 1 and 2 will be denied.

Finally, I'm going to set forth briefly the reasons for denying DeLuca's motion to dismiss Count 1.

I previously denied from the bench DeLuca's motion to dismiss Count 1 of the indictment. However, in view of the complexity of the issues raised, and in view of the fact that the same issues will arise during the course of the case and when the jury is charged, I want to try to make clear what my view of the law is.

In his motion DeLuca contends that Count 1 which charges a Section 1962(d) RICO conspiracy is defective as to him because it does not charge directly or by incorporating other counts either that DeLuca committed two predicate acts himself or else intended to or agreed to commit two predicate acts

himself. The point he raises is far from frivolous. The law in some circuits would lead to the conclusion he urges. The leading Third Circuit case on the subject is not crystal clear on this point. United States v. Riccobene, 709 F. 2d 214 (1983). There the Court held that to prove a RICO conspiracy it must first be established that an enterprise exists and that agreement must be shown: That each participant knowingly associated himself with a larger enterprise, understanding its scope and agreeing to further its affairs through the commission of various predicate offenses.

The Court then demonstrated that the evidence showed that each defendant personally committed at least two predicate offenses. DeLuca can argue from this that the Third Circuit has ruled that in order to establish a RICO conspiracy, each defendant must be shown to have personally committed two predicate offenses. If this were the rule, it would seem that the conspiracy section has been swallowed by the Section 1962(c) substantive offense section.

I have concluded that this is not what Riccobene holds. I intend to follow the law as set forth in Judge Ackerman's recent opinion in United States v. Lowal 560, Civil Action No. 82-689. Although it is a civil RICO case, the law is the same. His reasoning is persuasive. The discussion of this point will be found at pages 134 through 138. There are other RICO subjects in the opinion which may be useful in this case, and I

recommend that counsel review Judge Ackerman's entire discussion of RICO.

On the conspiracy point which is the subject of DeLuca's motion, Judge Ackerman ruled:

"I, therefore, conclude that a RICO 'Enterprise' conspiracy may be established without personal conduct amounting to two personal predicate offenses. Instead, it is sufficient if the government demonstrates the agreement through the defendant's aiding and abetting in at least two such offenses or through assent through the commission by someone else or several others of at least two such offenses." Slip opinion at 136.

Adopting this position, I will deny DeLuca's motions to dismiss Count 1 as to him.

All right. That takes care of what I want to put on the record.

Now, is there anything the government wants to state as to the status of the case at this time which would assist the motions?

MR. RUSSELL: Your Honor, the only difference that we have with anything the Court has said thus far is that we count only 13 remaining defendants with those we understand either have pleaded or will plead or will be dismissed from the case.

THE COURT: Well, maybe we should run through and see which ones we are talking about. The numbers seem to float.

MR. RUSSELL: I think we may be actually be down to 12 with an announcement that the United States will dismiss charges

INSTRUCTION ___

RICO CONSPIRACY-ELEMENT

In Count 1, Defendant TYRONE ADAMS, JOHN PATRICK ARENZ, ICK DeLUCA AND MICHAEL VISCITO, are charged with conspiracy olate the Racketeering Influenced Corrupt Organizations Act. der to establish the offense charged in Count 1 of the Indictment, ssential elements must be established beyond reasonable doubt, llows:

First: That an enterprise existed as defined in these instructions;

Second: That at least some members of the enterprise engaged in a pattern of racketeering activity, as hereinafter defined, by knowingly and willfully committing at least two acts of racketeering activity as charged in the Indictment and hereinafter explained;

Third: That at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October 10, 1970, and that th offenses were connected to each other or to the enterprise by some common scheme, plan, or motive so as to constitute a pattern and not merely a series of disconnected acts;

Fourth: That the affairs of the enterprise were conducted through the commissions of two or more predicate acts;

Fifth: That the enterprise engaged in, or that its activities affected interstate commerce; and

Sixth: That the Defendant knowingly and intentionally agreed to participate in the affairs of the enterprise by personally committing two or more predicate acts.

An agreement to commit a predicate offense is in itself insufficient to convict a defendant. Similarly, an agreement merely to participate in the same enterprise will not establish the offense charge. You are, therefore, instructed, that unless you find beyond a reasonable doubt that the Defendant agreed to participate in the affairs of the enterprise by personally committing two or more predicate acts, you must acquit the defendant.

You are further instructed that in order to convict the defendant you must find that his agreement to participate in the affairs of the enterprise by personally committing two or more predicate acts was knowing and intentional. In order to find that such an agreement is knowing intentional, you must find beyond reasonable doubt that the defendant knew the full scope of the enterprise. Therefore, if the defendant thought that the crime or crimes, if any, that he was agreeing to commit was or were to be an isolated venture, he is not guilty of the offense charged in Count 1.

Accordingly, if the Government has not proved beyond reasonable doubt that the Defendant knew the full scope of the enterprise, you must acquit the defendant.

Sources: United States v. Carter, 721 F.2d 1514, 1531 (11th Cir. 1984); United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983); United States v. Lemm, 680 F.2d 1193, 1200 (8th Cir. 1982), cert. denied, 103 S. Ct. 739 (1983); United States v. Bledsoe, 674 F.2d 647, 665 n. 12 (8th Cir.), cert. denied, 103 S. Ct. 456 (1982); United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 103 S. Ct. 1249 (1983); United States v. Sutherland, 656 F.2d 1181, 1194 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982).

APPROVED: _____

DISAPPROVED: _____

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
v.	:	Criminal No. 83-37
NICHOLAS VALVANO, et al.	:	

REQUESTS TO CHARGE

W. HUNT DUMONT
United States Attorney

On the Requests:

THOMAS G. ROTH
ANDREW K. RUOTOLO, JR.
JUDY G. RUSSELL
Assistant U.S. Attorneys

within New Jersey for ultimate distribution to customers outside of New Jersey (for example, Pennsylvania and New York).

You are instructed, in this regard, that if you find beyond a reasonable doubt that these transactions or events occurred, and that the same occurred in, or as a direct result of, the conduct of the affairs of the alleged enterprise, the requisite effect upon interstate commerce has been established. If you do not so find, the requisite effect upon interstate commerce has not been estabished.

H. RICO Conspiracy Explained

Count 1 of the indictment alleges that the defendants Tyrone Adams, Michael Viscito, a/k/a "Morgan," and other named individuals conspired to do what Count 2 alleges that the group in fact did; it charges that they agreed with each other and with others to conduct the enterprise's affairs through a pattern of racketeering activity.

In order to convict either of the defendants -- Adams, or Viscito -- of the RICO conspiracy, as charged in Count 1 of the Indictment, you must conclude beyond a reasonable doubt that each defendant, with knowledge of the conspiracy, wilfully became a member of that conspiracy by agreeing to participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity. 1/

1/ United States v. Boffa, 688 F.2d 919, 937 (3d Cir.) 1982); cf. United States v. Riccobene, 709 F.2d 214, 225 (3d Cir. 1983).

Unlike a substantive RICO violation, as alleged in Count 2 of the Indictment, there is no requirement that the Government prove that a RICO conspiracy defendant actually have committed two predicate acts of racketeering to be found guilty of the crime. It is sufficient that the Government demonstrate the defendant's agreement to participate unlawfully in the enterprise through proof that the defendant aided or abetted at least two such offenses or that he assented to the commission by someone else or several others of at least two such offenses. Defendant's agreement must be knowing and intentional.[2/]

2/ United States v. Local 560, International Brotherhood of Teamsters, etc., Civ. No. 82-689 (D.N.J. 2/8/84), slip. op. at 138-140.

H. RICO Conspiracy Explained

Count 1 of the indictment alleges that the defendants Tyrone Adams, Michael Viscito, a/k/a "Morgan," and other named individuals conspired to do what Count 2 alleges that the group in fact did; it charges that they agreed with each other and with others to conduct the enterprise's affairs through a pattern of racketeering activity.

In order to establish the offense charged in Count 1 of the Indictment, essential elements must be established beyond reasonable doubt, as follows:

First: That an enterprise existed as defined in these instructions;

Second: That the enterprise engaged in, or that its activities affected interstate commerce; and

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Third: That the defendant knowingly and intentionally agreed to participate in the affairs of the enterprise through a pattern of racketeering activity.

An agreement to commit a predicate offense is in itself insufficient to convict a defendant. Similarly, an agreement merely to participate in the same enterprise will not establish the offense charged. To convict a defendant on the Count 1 RICO conspiracy charge you must find beyond a reasonable doubt that the defendant [redacted] knowingly and intentionally (i) agreed to participate in the affairs of the enterprise (ii) through a pattern of racketeering activity. If you do not so find, you must acquit the defendant on Count 1.

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THE COURT: What I propose to do is to go through the motions. I don't think extensive argument is required because I pretty much covered what I had to say on previous occasions.

I assume each defendant wishes to set forth certain motions for the record.

Mr. Reinfeld?

MR. REINFELD: Your Honor, I would rest on the record of this case and move pursuant to Rule 29 to be granted judgment of acquittal on all count.

THE COURT: All right.

Mr. Lopez?

MR. LOPEZ: Your Honor, as far as Thomas DiDonato is concerned, I would renew my other motion at the end of the government's case for Rule 29 jugment of acquittal. I urge it at the present time.

THE COURT: Mr. Smith.

MR. SMITH: Your Honor, on behalf of my client Clifton Brooks, I again move for Rule 29 judgment of acquittal.

THE COURT: Mr. Campen?

MR. CAMPEN: Judge, I join in the Rule 29 application on behalf of my client.

THE COURT: Mr. Sette?

MR. SETTE: On behalf of John Hairston, so do I.

THE COURT: All right.

MR. ANGELASTRO: Same motion, your Honor, on behalf of

MR. REINFELD: Yes.

I guess that moves us on to the RICO conspiracy, and I have some problems with that.

THE COURT: Wait one minute.

MR. REINFELD: I'm sorry.

THE COURT: The RICO conspiracy.

MR. REINFELD: In my opinion, the way the government charges the RICO conspiracy, all you need is the same intent as a drug conspiracy.

I believe your Honor hit the nail on the head the other day when during the Rule 29 motion you mentioned, and the government conceded, that it takes something more than simply agreeing to join a drug conspiracy in order to be guilty of a RICO conspiracy.

I think it takes some knowledge of the enterprise and scope of the enterprise, and I would urge on your Honor my instruction.

I might add, your Honor, and I mentioned this before, we have fundamental disagreement as to whether you have to prove that my client conspired and agreed to commit two predicate acts.

You have chosen --

THE COURT: I have accepted the position that Judge Ackerman took.

MR. REINFELD: Correct. Just for the record, we do

have that disagreement. So maybe that can be changed.

THE COURT: What page is this -- is your conspiracy on?

MR. REINFELD: It is --

THE COURT: Is it before or after what we were just dealing with?

MR. REINFELD: It is after. It is about five or six pages back. It says "RICO conspiracy, elements." Eight pages back.

THE COURT: All right.

MR. REINFELD: I recognize it does not reflect the specific area of the law.

THE COURT: Let's see.

Well, would you agree, Mr. Roth, that that states the law?

MR. ROTH: Judge, I think that we attempted, in our charge, to pattern it as closely as we could after the Local 560 case. I think that is a correct statement of the law in this district.

MR. REINFELD: Except, your Honor, it says that --

MR. ROTH: Mr. Reinfeld suggests in it that the person who is charged with a RICO conspiracy actually have committed two predicate acts.

In this instance they did in fact commit two predicate acts. So it's really moot. But it is not required in a RICO conspiracy.

THE COURT: You have to have knowledge of the enterprise and knowingly joined it.

MR. REINFELD: That's correct, your Honor. And here all they have is you must conclude beyond a reasonable doubt that each defendant with knowledge of the conspiracy wilfully became a member of that conspiracy by agreeing to participate directly or indirectly in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

THE COURT: Excuse me. Whose are you reading?

MR. REINFELD: I'm reading the government's.

That allows the jury to convict simply if they find my client is guilty of Count 4.

MR. ROTH: Judge, we continue on page 31 of our charge to amplify that substantially.

MR. REINFELD: I think it is confusing.

THE COURT: Well, that I won't deny.

(Pause.)

THE COURT: You have Ricobene.

MR. ROTH: Ricobene is a Third Circuit case.

THE COURT: The charge.

MR. ROTH: Yes.

THE COURT: How is that in relation to this?

I don't think the Third Circuit -- I don't think it says anything about the charge. It would be a big help if it did.

MR. ROTH: I don't think it did.

THE COURT: No.

MR. REINFELD: Judge, it would be very difficult for a jury to follow and not only that, it would be very difficult to try to sum up for it.

MR. TREACY: Judge, I would like to be heard in one respect.

I think if the Court were not to charge Count 4 with respect to Mr. Adams and Mr. Viscito, because clearly all the elements of Count 4, the narcotic conspiracy basically have to be proved in order to convict the RICO conspiracy under the facts of this case.

RICO includes one extra element which is the enterprise element. I think that the Count 4 merges with the RICO conspiracy with respect to the facts of this case and these two defendants.

If they prove a conspiracy, the only element above that

is an enterprise involved.

THE COURT: Well, also the pattern.

MR. REINFELD: The bottom line is a plain old conspiracy and the government added two telephone calls.

THE COURT: I have my own views compounding a relatively simple case into this.

MR. REINFELD: Everybody sitting at this table is a RICO defendant because there are two telephone calls by everybody except Mr. DeLuca.

MR. ROTH: I think what Mr. Treacy is saying is the conspiracy in Count 4 is a lesser included offense of the RICO conspiracy and it is really not.

THE COURT: I think there is a major difference between the two, a major theoretical difference between the two counts. I suppose that would give the jury a challenge.

Well, tell me what's wrong, Mr. Roth, with Mr. Reinfeld's charge.

MR. ROTH: Well, Judge, first of all, the second element is not in fact required under the RICO conspiracy.

In his charge it says that they must knowingly and wilfully engage in a pattern of racketeering activity by knowingly and wilfully committing at least two acts of racketeering activity as charged in the indictment. That's not correct.

THE COURT: That's Judge Ackerman who doesn't think

it's correct.

MR. ROTH: That's correct.

MR. REINFELD: There has been some RICO violation somewhere. I didn't say --

THE COURT: You have to have reached a RICO violation by some in order to have a conspiracy by others.

MR. REINFELD: The bottom line is I have not seen one RICO conspiracy case which hasn't been charged with a substantive case either. This may be more theoretical than actuality.

Every case I've seen on the subject has both of them together.

THE COURT: This really is different from what Judge Ackerman found. Judge Ackerman found a person who is part of the conspiracy does not himself have to have agreed that two predicate acts be committed.

This doesn't say that. This says that there is an enterprise that at least some members, though not necessarily the persons charged in the conspiracy count, engaged in the pattern of racketeering activity by committing the two acts, the two predicate acts.

Do you think that's right or wrong, Mr. Roth?

MR. ROTH: No, I think it's wrong.

THE COURT: You think it's wrong. All right.

So you would agree with the first one, that there is an

enterprise.

MR. ROTH: That's correct.

THE COURT: So you can't have a conspiracy sustained unless it at least got to the point where there is an enterprise.

MR. ROTH: Absolutely true.

THE COURT: So the first is all right.

How about the third?

MR. ROTH: The third is also wrong because it suggests that at least two acts of racketeering activity have in fact occurred. I don't think that's necessary.

THE COURT: All right. So long as you have the enterprise, you don't have to go any further.

MR. ROTH: No, no. I think you do have to go further.

You have to have an enterprise which -- in addition to having the enterprise, the individuals have to have agreed to engage in the enterprise through a pattern of racketeering activity.

So, they must at least must have contemplated the commission of racketeering activity in addition to the enterprise.

MR. REINFELD: And they have to have knowledge of the enterprise also, I would think.

MR. ROTH: That is in any conspiracy.

THE COURT: So I would agree with Mr. Roth that the

second and third of your charge are not required. Now let's look at the fourth.

This is that the affairs of the enterprise were conducted to permit two or more predicate acts. That's the same thing as the third, would it not be? Would you agree that -- or would you contend the fourth is not appropriate?

MR. ROTH: That's not appropriate also.

THE COURT: All right. Now, the fifth one, how about that?

MR. ROTH: I think that's appropriate.

THE COURT: All right. And six? Probably modified, "that the defendant knowingly and intentionally agreed to participate in the affairs of the enterprise" and stop there.

MR. ROTH: No.

THE COURT: No?

MR. ROTH: "That the defendant knowingly and intentionally agreed to participate in the affairs of the enterprise through a pattern of racketeering activity as opposed to by personally committing two or more predicate acts."

THE COURT: All right. That's probably correct.

Now, so if we took Mr. Reinfeld's proposed charge as up to and through the first and include the fifth and include the sixth as modified, does that set out the offense of conspiracy to violate the RICO statute?

MR. REINFELD: Which ones of mine are we taking?

THE COURT: We are using yours, except we are crossing out your second, your third, your fourth and modifying your sixth.

MR. REINFELD: You are using my first and my sixth.

THE COURT: Using your first, your fifth and a modified sixth.

How does that do it? Does that give you a definition of the offense?

MR. ROTH: I think it does.

THE COURT: Don't you think that's clear in yours?

MR. ROTH: Yes.

THE COURT: So why can't we use -- this could be in substitution for -- I think we can use your first paragraph on page -- then could we pick up Mr. Reinfeld's starting, "In order to establish the offense charged in Count 1, three essential elements must be established beyond a reasonable doubt as follows." And then go down to his sixth, omitting the second, third and fourth and that would replace your second paragraph.

MR. ROTH: Yes, Judge.

I think if you take what is left of Mr. Reinfeld's instruction, it is tantamount to our second paragraph.

THE COURT: I think it is. And this spells it out in somewhat more understandable manner. All right.

MR. REINFELD: May I ask, and again without waiving anything, that we continue on, though? I think some of the

language in my proposed instruction, the modification would be appropriate for what the Court wants to charge, again without waiving my contention that the Court is correct.

THE COURT: I was going to move on now to the rest of the government's and the rest of yours.

MR. REINFELD: Since we are on the conspiracy and there is nothing really left, it probably would be appropriate to continue on with mine.

THE COURT: What about page 31 of the government's?

MR. ROTH: Judge, I think a slight modification of Mr. Reinfeld's next paragraph would just about do it.

THE COURT: Omit your last paragraph and modify his?

MR. ROTH: That's correct.

If you take his next paragraph, right up until the last clause, right up until the last couple of lines, I think you have a correct statement.

THE COURT: An agreement to commit a predicate offense is in itself insufficient to convict a defendant?

MR. ROTH: Yes. That's a correct statement.

THE COURT: Similarly, an agreement merely to participate will not establish the offense charged.

MR. ROTH: Correct.

THE COURT: "You are therefore instructed that also unless you find beyond a reasonable doubt that the defendant agreed to participate in the affairs of the enterprise" --

MR. ROTH: And stop there. And modify the remaining portion, I think you have a correct statement of the law.

THE COURT: How do you modify the remaining portion?

MR. ROTH: "Participate in the affairs of the enterprise by" -- "enterprise through a pattern of racketeering activity, you must acquit the defendant."

MR. REINFELD: You need "a knowing and intentional right" after that too, I think.

"You are further instructed to convict the defendant, that it was knowing and intentional."

THE COURT: Could you have the "knowingly and intentionally agreed," that "the defendant knowingly and intentionally agreed to participate"?

MR. REINFELD: Okay. Well, I think maybe then, "In order to find that such an agreement is knowing and intentional, you must find beyond a reasonable doubt that the defendant knew the scope of the enterprise." I think you can use that language.

THE COURT: I'm not sure he has to know the scope of the enterprise.

MR. ROTH: No, Judge, I don't think he does.

I think knowingly and intentionally in that context doesn't mean he knows the scope of the enterprise. It means he's not doing it by mistake.

MR. REINFELD: I think he has to know that an

enterprise exists.

THE COURT: "You are therefore instructed that unless you find beyond a reasonable doubt that the defendant knowingly and intentionally agreed to participate in the affairs of the enterprise through a pattern of racketeering activity, you must acquit the defendant."

Does that give you any problem, Mr. Roth?

MR. ROTH: No, sir. I think it is accurate. I think you have to eliminate the next paragraph, though, because it is incorrect.

THE COURT: Yes, I think under my understanding that is incorrect. Mr. Reinfeld's contention is that it is the law.

That's where we have reached an issue which could be tested subsequently.

MR. REINFELD: Yes.

THE COURT: "In order to find that such an agreement is intentional, you must find beyond a reasonable doubt that the defendant knew the full scope of the enterprise."

MR. ROTH: I think that's so.

THE COURT: What about the last?

MR. ROTH: I think that's an accurate statement of the law.

THE COURT: I think I ought to strike out the "therefore." Start with "If the defendant thought the crime or crimes, if any, that he was agreeing to commit were to be an

IN THE

UNITED STATES DISTRICT COURT

OF THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. NICHOLAS VALVANO, a/k/a "Nicky Boy", (and 45 other Defendants)	)	NO. 83-351 JUDGE DICKINSON DEBEVOISE

MOTION TO DISMISS INDICTMENT

Defendant TYRONE ADAMS, hereby moves this Honorable Court to dismiss Counts 1,2,25 and 56 of the Indictment. In support of this Motion, Defendant would show that:

1. On December 15, 1983, a Federal Grand Jury sitting in Newark returned a superceding indictment against Defendant Tyrone Adams and 45 other co-defendants alleging numerous violations of federal law.

2. Defendant Tyrone Adams is specifically charged with two counts of facilitating a drug transaction (Counts 25 & 56), one count of conspiracy to violate the federal drug laws (Count 4), one count of conspiracy to racketeer (Count 1) and one count of actual racketeering (Count 2).

3. Counts 25 and 56 involve calls allegedly made by Defendant Tyrone Adams on August 30, 1983, and October 24, 1983, respectively. Each count fails to specify which of the over 142 controlled substances specified in 21 U.S.C. §§ 812 (1982) that Defendant Tyrone Adams may have discussed on the telephone nor how the charged felonies were facilitated.

4. The failures referred to in Paragraph 3 above render the indictment fatally defective. United States v. Hinkle, 637 F. 2d 1154, 1156 (7th Cir. 1981). Furthermore, a bill of particulars would not cure this deficiency. Id.

5. Count 2 specifically incorporates by reference Counts 25 and 56. The latter two counts are charged to show a "pattern of rackateering". In order to prove a violation of RICO, the Government must prove beyond a reasonable doubt: (1) that an "enterprise" affecting interstate or foreign commerce existed; (2) that the defendant associated with the enterprise; (3) that the defendant participated in the conduct of the enterprise's affairs; and (4) that the participation was through a pattern of rackateering activity, i.e., by committing at least two acts of rackateering activity designated in 18 U.S.C. §§ 1961 (1) (1982). United States v. Phillips, 664 F. 2d 971, 1011 (5th Cir. 1981); see United States v. Riccobene, 709 F. 2d 214, 221 (3d Cir. 1983). Since Counts 25 and 56 are deficient, Count 2 must also fail because of the incorporation by reference.

6. Count 1 of the Indictment alleges a conspiracy to violate RICO. 18 U.S.C. §§ 1962 (d) (1982). The gravamen of a RICO conspiracy is that each individual "agree to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes." United States v. Elliott, 571 F. 2d 880, 902 (5th Cir. 1978). In the case of Defendant Tyrone Adams, there can be little doubt that the Government is relying on the two

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telephone calls listed in Counts 25 and 56 in order to show sufficient conspiratorial intent. Since the indictment fails to allege these calls as overt acts, it is deficient. Furthermore, due to the Government's faulty pleading, a bill of particulars could not cure this defect since it must necessarily incorporate by reference the defective telephone counts.

WHEREFORE, PREMISES CONSIDERED, Defendant Tyrone Adams moves that this Honorable Court grant his motion and dismiss Counts 1,2, 25 and 56 of the Indictment.

Respectfully submitted,

Joel J. Reinfeld

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ATTORNEY FOR DEFENDANT
TYRONE ADAMS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss Indictment was served upon Thomas G. Roth, Esq., Assistant U.S. Attorney, 970 Broad Street, Room 502, Newark, New Jersey, 07102, by United States Mail, postage prepaid, on this 17th day of March, 1984.

Joel J. Reinfeld

JOEL J. REINFELD

A-224

Rec'd
MAR 28 1984

U.S. Department of Jus

United States Attorney
District of New Jersey

970 Broad Street, Room 502
Newark, New Jersey 07102

JGR:jeg/2642

March 23, 1984

HONORABLE DICKINSON R. DEBEVOISE
United States District Judge
United States Courthouse
Newark, New Jersey 07101

Re: United States v. Valvano, et al.,
D.N.J. Criminal No. 83-351 (DRD)

Dear Judge Debevoise:

Kindly accept this as the letter-brief of the United States in response to defendant Tyrone Adams' motion to dismiss Counts 1, 2, 25 and 56 of the indictment on the grounds that the charges under 21 U.S.C. § 843(b) are fatally defective.

Defendant relies solely on the case of United States v. Hinkle, 637 F.2d 1154 (7th Cir. 1981), to urge the Court to find that the § 843(b) counts ("telephone counts") are subject to dismissal because each "fails to specify which of the over 142 controlled substances specified in 21 U.S.C. § 812 (1982) that [defendant] may have discussed on the telephone nor how the charged felonies were facilitated." In a domino-theory argument, defendant then contends that Counts 1 and 2 must fall as they are dependent upon Counts 25 and 56 to define defendant's culpability.

The United States respectfully submits that Hinkle is wholly inapposite to the instant case, and does not support defendant's dismissal argument.

As an initial proposition, the law is clear that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. . . It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence to be punished.'" Hamling v. United States, 418 U.S. 87, 117 (1974) (citation omitted).

The telephone counts in Hinkle charged defendant there with using a telephone "'to facilitate acts constituting a felony under Title 21, United States Code, Section 841(a)(1).'" 637 F.2d at 1156. None of the counts identified the other party to the conversation, the time it took place, nor which of the six types of acts prohibited by § 841(a)(1) and 142 controlled substances of the statute were involved. Nothing in the Hinkle opinion suggests the existence of a wiretap; thus, there are no references to tapes, transcripts or other evidence provided in advance of trial as to the precise contents of the conversations alleged to have facilitated the § 841(a)(1) felony.

Here, to the contrary, each count sets forth with specificity the time and date on which it occurred, the parties to the conversation and the precise felony -- the conspiracy to distribute and possess with intent to distribute controlled substances -- the call is alleged to have facilitated. Moreover, in pretrial discovery, transcripts of all of the charged conversations and hundreds of other calls were provided to all defendants.

The key distinction between Hinkle and this case, of course, is the nature of the felony alleged to have been facilitated. In Hinkle, the felony was one of the substantive acts under § 841(a)(1). By the nature of the felony, defendant had to have facilitated manufacture or distribution or dispensation or possession with intent to distribute some specific controlled substance. Defendant was not informed, by the language of the count, of the essential elements of the crime she stood accused of committing.

In this case, on the other hand, the charge is facilitation of a conspiracy -- a partnership in crime -- that had multiple objectives: the distribution and possession with intent to distribute controlled substances. Which controlled substance -- a matter of significance under § 841(a)(1) -- is irrelevant in terms of an § 843(b) charge of facilitating a broader conspiracy. Indeed, a telephone call that had as its object the collection of money to pay the rent or the telephone bill so that the conspirators could continue to operate would fall within § 843(b) as to that conspiracy. Under the law, there need be no substantive offense involving any particular controlled substance at all. See United States v. Pierorazio, 578 F.2d 48, 51 (3d Cir.), cert. denied, 439 U.S. 981 (1978) ("proof of an underlying inchoate crime, such as attempt or conspiracy under § 846, is sufficient to sustain a facilitation conviction under § 843(b)[;] it is . . . not necessary that an actual, consummated distribution be shown").

In this case, therefore, the language of the counts clearly sets forth sufficient information to withstand the attack mounted by defendant. The elements of the offense -- knowing and intentional use of a telephone to facilitate a conspiracy to distribute and possess with intent to distribute controlled substances -- are stated; the additional specifications of the time, date and parties to the conversation provide a further guarantee that defendant can plead his acquittal or conviction as a bar to double jeopardy. All of the elements of the Hamling test are met and the telephone counts are not subject to dismissal.

Even were the Court to conclude that some further specificity were required, such specificity exists in the form of the transcripts provided by the United States as well as the bill of particulars identifying the handful of controlled substances alleged to have been possessed and distributed by the conspirators.*

For the foregoing reasons, the United States respectfully submits that defendant's motion to dismiss the telephone counts as defective and to dismiss other counts as founded on the telephone counts should be denied.

Respectfully,

W. HUNT DUMONT
United States Attorney

By: JUDY G. RUSSELL
Assistant U.S. Attorney

cc: Clerk of the Court
All defense counsel

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* The Hinkle court's comment -- made without elaboration -- that a bill of particulars could not cure the deficiencies in the telephone counts there has no application to the facts here. The Hinkle court focused on the fact that the indictment there failed to set forth "the gravamen of the alleged offense: what she attempted to facilitate with which controlled substance." 637 F.2d at 1158. The "gravamen of the alleged offense" here is clearly set forth: the facilitation of a defined conspiracy with multiple objectives, by means of a specific call with specific parties and with specific content.

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March 28, 1984

The Honorable Dickinson R. Debevoise
United States District Judge
United States Courthouse
Newark, N.J. 07101

Re: United States v. Tyrone Adams,
No. 83-351

Dear Judge Debevoise:

Please accept this letter as a Response to The Government's opposition to Defendant Tyrone Adams' Motion to Dismiss Counts 1,2, 25 and 56 of the Indictment. Despite the Government's attempt to distinguish the Hinkle case, it is clear that it is still controlling and that it mandates dismissal of all but Count 4 of the Indictment vis-a-vis Mr. Adams. The Hinkle case clearly states:

> Therefore, we hold that an indictment issued for violations of 21 U.S.C. § 843 (b) must specify the type of communication facility used, the date on which it was used, the controlled substance involved and some sort of statement of what is being facilitated with that controlled substance which constitutes a felony. See United States v. Bolin, 514 F.2d 554 (7th Cir. 1975). Without this crucial, minimal information, a defendant is deprived of her Sixth Amendment right to be apprised of the charges against . . . (him), and . . . (his) Fifth Amendment right to establish a record to defend against a possibility of double jeopardy.

nited States v. Hinkle, 637 F.2d 1154, 1158 (7th Cir. 1981) emphasis added). Nowhere in either Counts 25 or 56 is the precise ontrolled substance identified. The Government's argument that assive discovery has cured this fatal deficiency is clearly without erit. Certainly such information could have been provided by a ill of particulars yet even a bill of particulars will not cure a efective indictment. See id. at 1156.

On the second page of its letter-brief, the Government argues hat Counts 25 and 56 of the Indictment are sufficient because they ention the precise felony; "the conspiracy to distribute and possess ith intent to distribute controlled substances". The Government

pparently arguing that since it specifically delineated rolled substances in Count 4 that that conspiracy is necessarily rporated by reference into Counts 25 and 56 and that the ctment is therefore not defective. While the Government may intended to charge "the conspiracy" mentioned in Count 4, it rly did not do so. Counts 25 and 56 charge "a knowing and ful conspiracy to distribute and possess with intent to ribute controlled substances". Such language is as amorphous he language used in the Hinkle case. Furthermore, it gives no rmation as to the drug involved as is required by Hinkle. Finally, hould be noted, that the fact that this case involves a conspiracy ge as opposed to the substantive one involved in Hinkle is terial. Some controlled substance must necessarily be involved conspiracy charged under 21 U.S.C. § 846 (1982), otherwise e is no violation of the federal drug laws.

Defendant Tyrone Adams is constitutionally entitled to be erly charged in the Indictment. For the foregoing reasons, as as those contained in Defendant Adams' initial motion, the rnment's failure to so properly charge mandates dismissal of ts 1,2, 25 and 56 of the Indictment. Defendant's Motion to iss should therefore be granted.

Respectfully,

Joel J. Reinfeld

Joel J. Reinfeld

sr

Judy G. Russell, Esq.
All Remaining Defense Counsel

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ioner controls the nursing home, nor can it at this time legally force Health Group to rehire the discharged employees or to apply the collective bargaining agreement. Thus, even if the union succeeds at arbitration against Sky Vue, it is likely to receive only an award of money damages to compensate the employees for Sky Vue's breach of the collective bargaining agreement. A complete dissolution and distribution of Sky Vue's assets prior to the arbitration, however, would render such an award meaningless, essentially frustrate the arbitration process, and effectively allow Sky Vue to escape its contractual promise to arbitrate disputes over interpretation of the collective bargaining agreement. Finally, the balance of hardships on the two sides favors the issuance of the injunction. The injunction allows Sky Vue to pay its ordinary debts, but prohibits it from completely devastating, through payments to shareholders or otherwise, the corporate assets. When balanced against the possible harm to the former Sky Vue employees, the freezing of Sky Vue's assets does not constitute undue hardship. We will affirm, therefore, the second part of the district court's order.

III.

Although we recognize the strong federal policy against federal court involvement in labor disputes, the injunction in this case furthers the federal policy favoring voluntary resolution of labor disputes, and prevents the employer from escaping its promise to arbitrate and from frustrating the arbitral process through dissolution of its assets. Accordingly, we will affirm the judgment of the district court in its entirety.

UNITED STATES of America
v.
ADAMS, Tyrone, Appellant in No. 84-5455.

UNITED STATES of America
v.
DiDONATO, Thomas, John Doe, a/k/a "Big Tommy" being a resident of 2833 Ford St., Brooklyn, N.Y.
Appeal of Thomas DiDONATO, in No. 84-5456.

UNITED STATES of America
v.
HAIRSTON, John a/k/a "Rip", Appellant in No. 84-5457.

UNITED STATES of America
v.
ALONGI, Anthony a/k/a "Tony", Appellant in No. 84-5458.

UNITED STATES of America
v.
VISCITO, Michael a/k/a "Morgan", Appellant in No. 84-5459.

UNITED STATES of America
v.
MUSTACCHIO, Joseph a/k/a "Joe Mustache", Appellant in No. 84-5460.

UNITED STATES of America
v.
BROOKS, Clifton Raymond a/k/a "Shotsie", Appellant in No. 84-5461.

UNITED STATES of America
v.
CALLICCHIO, Nicholas a/k/a "Monk", Appellant in No. 84-5480.

Nos. 84-5455 to 84-5461 and 84-5480.

United States Court of Appeals, Third Circuit.

Argued March 25, 1985.

Decided April 15, 1985.

Rehearing and Rehearing In Banc in No. 84-5456 Denied May 10, 1985.

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Defendants were convicted before the United States District Court for the District of New Jersey, Dickinson R. Debevoise, J., of a variety of charges stemming from a large-scale narcotics distribution conspiracy, including conspiring to distribute and possess with intent to distribute controlled substances, participating in a RICO conspiracy and committing a substantive RICO violation, and use of a telephone to facilitate the narcotics conspiracy, and they appealed. The Court of Appeals, Aldisert, Chief Judge, held that: (1) Government met unavailability requirement with regard to admission of coconspirator's statements; (2) newly discovered evidence about prior crime of one of Government's key witnesses did not warrant a new trial; (3) district court did not err in admitting into evidence weapons seized from various members of conspiracy; (4) defendants did not prove variance between proof and indictment based on theory that proof evidenced multiple conspiracies, rather than single conspiracy charged in indictment; (5) variance between proof and indictment in that indictment failed to mention marijuana was harmless; (6) evidence was sufficient to convict four of the defendants; (7) there was no error in use of wiretap evidence at trial; (8) defendant need not commit or agree to commit personally predicate acts of racketeering to be found guilty of a RICO conspiracy; and (9) telephone facilitation counts were not defective because counts failed to name particular controlled substance.

Affirmed.

1. Criminal Law ⇐422(1)

To admit a coconspirator's statements, district court must rule both that statements have required indicia of reliability, and that coconspirator is unavailable.

2. Criminal Law ⇐662.9

Lack of credibility of a witness is not proper grounds for finding him to be unavailable for purposes of confrontation clause. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐422(1)

Government met unavailability requirement for admission of coconspirator's hearsay statements, where coconspirator appeared before court in chambers, in presence of Government and defense lawyers, and claimed his Fifth Amendment privilege not to testify. U.S.C.A. Const.Amend. 5.

4. Witnesses ⇐304(1)

Decision to grant witness immunity is reserved to discretion of executive branch.

5. Criminal Law ⇐1036.2

Claim that Government should have granted coconspirator use immunity would not be considered on appeal, where trial court had no opportunity to address issue.

6. Criminal Law ⇐1156(1)

Standard of review for denial of a motion for new trial is abuse of discretion. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

7. Criminal Law ⇐938(1)

In moving for a new trial on ground of newly discovered evidence, defendant must meet five part test: evidence must be in fact, newly discovered, i.e., discovered since the trial; facts must be alleged from which court may infer diligence on part of movant; evidence relied on must not be merely cumulative or impeaching; it must be material to issues involved; and it must be such, and of such nature, as that, on a new trial, newly discovered evidence would probably produce an acquittal.

8. Criminal Law ⇐945(2)

Newly discovered evidence pertaining to a jewel robbery in which Government's key witness participated did not warrant a new trial, as evidence was merely impeaching and almost certainly would not have produced an acquittal.

9. Criminal Law ⇐700(2)

A new trial is justified for a *Brady* violation when undisclosed evidence is material either to guilt or to punishment.

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10. Criminal Law ⇐700(4)

New trial was not merited on theory that Government's failure to disclose government witness' participation in robbery violated *Brady v. Maryland*, since information was merely impeaching and almost certainly would not have produced an acquittal, and thus failure to disclose was harmless.

11. Criminal Law ⇐1153(1)

Decision admitting evidence as more probative than prejudicial is reviewed under an abuse of discretion standard. Fed. Rules Evid.Rule 403, 28 U.S.C.A.

12. Criminal Law ⇐404(4)

District court did not err in admitting into evidence weapons seized from various members of narcotics conspiracy, notwithstanding claim that types of weapons seized, including an Uzi submachine gun, were overly prejudicial because they were "weapons of extreme violence and looked like they were taken from set of a Hollywood gangster movie," since weapons had probative value as evidence of large-scale conspiracy and type of protection conspirators felt they needed to protect their operation; moreover, in view of length of trial, any prejudicial effect from weapons was merely speculative. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

13. Criminal Law ⇐824(8)

Trial court did not err by not giving a limiting instruction on relevance of weapons seized from various members of narcotics conspiracy, as none was requested, and defendants suffered no prejudice from lack of such instruction.

14. Criminal Law ⇐394.6(4)

District court's finding that weapon seized from dresser near defendant at time of his arrest was lawfully seized incident to arrest was not clearly erroneous.

15. Indictment and Information ⇐171

To establish variance between proof and indictment, defendant must show that there was a variance between the indictment and the proof and that the variance prejudiced some substantial right.

16. Conspiracy ⇐43(12)

Government's proof did not evidence multiple drug conspiracies, rather than single conspiracy charged in indictment, where conspiracy operated out of one address, under auspices of charitable organization, common goal of conspiracy was sale of drugs for profit, and each separate drug transaction was a step in achieving common goal, and thus defendants did not prove a variance between proof and indictment.

17. Criminal Law ⇐1167(1)

In determining whether variance between proof and indictment prejudices a defendant's substantial rights, Court of Appeals focuses upon potential for double jeopardy and unfair surprise that adversely affects defense. U.S.C.A. Const.Amend. 5.

18. Criminal Law ⇐1167(1)

Variance between proof and indictment arising from fact that indictment charged defendants with conspiracy to distribute narcotics, but did not list marijuana as one of the narcotics involved, was harmless, as knowledge that marijuana evidence would be introduced at trial was available to defendants during pretrial phase.

19. Criminal Law ⇐1170½(5)
Witnesses ⇐267

Extent of cross-examination is within the sound discretion of trial court, and a restriction will not constitute reversible error unless it is so severe as to constitute a denial of defendant's right to confront witnesses against him and is prejudicial to substantial rights of defendant.

20. Witnesses ⇐349

Trial judge did not abuse his discretion in restricting cross-examination about witness' involvement with witness protection program, where defendant did cross-examine witness about his participation in the program and was able to make crucial point, that of impeaching the witness; moreover, as trial court found, any further cross-examination would have impugned witness' credibility only marginally, while

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posing d r that other defendants would be severely prejudiced by discussion of threats that necessitated witness' joining program.

21. Criminal Law ⇐1148

In regard to discovery matters, district court's decision is reviewed under an abuse of discretion standard.

22. Criminal Law ⇐627.8(6)

Trial court did not abuse its discretion in admitting three exhibits of documents, even though Government did not premark the evidence as court's discovery order required, and defense had notice of exhibits only on day that Government introduced them, as exhibits were only corroborative, of theory already known to defense.

23. Criminal Law ⇐1134(8)

Because a relevancy decision implicates interpretation and application of legal precepts, review of Court of Appeals is plenary.

24. Conspiracy ⇐45

Parts of government witness' testimony relating to initial meeting between defendant and primary source of cocaine for drug conspiracy and three taped telephone conversations between defendant and coconspirator were properly admitted, as testimony concerning meeting was relevant to demonstrate defendant's connection to conspiracy and to prove that he was instrumental in procuring a source of cocaine; likewise, taped conversations were relevant because they showed defendant's connections with coconspirator who was one of the ringleaders of the conspiracy.

25. Criminal Law ⇐1171.1(2)

In evaluating prosecutor's conduct, Court of Appeals must decide whether his remarks, in context of entire trial, were sufficiently prejudicial to violate defendant's due process rights; a conviction will be reversed only in those situations in which prejudice inures to defendant from the challenged improprieties. U.S.C.A. Const.Amend. 5.

26. Criminal Law ⇐706(3), 720(5)

Prosecutor's question whether witness testified for defendant because he was afraid was not improper, as question represented time-honored means of trying to impeach witness by showing he had been intimidated into testifying favorably for the defense; moreover, any reference to subject in prosecutor's closing argument was an acceptable reference to Government's theory of why witness testified favorably.

27. Criminal Law ⇐1171.1(3)

Reference in prosecutor's closing argument to woman with a criminal conviction as an associate of defendants did not mandate reversal, where prosecutor made only a single reference to woman, reference was not protracted and judge responded to objection by saying he would strike all reference to woman; moreover, although judge gave no cautionary instruction, none was requested.

28. Criminal Law ⇐1147

Review of a sentence imposed by district court is extremely circumscribed; generally, if sentence falls within statutory maximum, matter is not reviewable on appeal; however, Court of Appeals may review sentence if there is a showing of illegality or abuse of discretion.

29. Criminal Law ⇐983

District court did not abuse its discretion in sentencing defendant to a higher prison term than that imposed on other defendants involved in drug conspiracy, considering defendant's deep involvement with ringleaders of conspiracy, his previous convictions, and his unwillingness to move away from a life of crime.

30. Criminal Law ⇐1148

Standard of review on denial of motion for severance is whether lower court abused its discretion; under such standard, defendant bears heavy burden in challenging denial.

31. Criminal Law ⇐622.2(6)

Defendant is not entitled to severance merely because evidence against a codefen-

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dant is more damaging than that against him; some exacerbating circumstances, such as jury's inability to "compartmentalize" the evidence, are required.

32. Criminal Law ⇐622.2(1)

District court did not abuse its discretion in denying defendants' motions for severance, where court was careful to sever affiliated weapons charges because of undue prejudice they might generate, and remaining charges all fell under umbrella drug conspiracy operating under auspices of charitable organization; moreover, Government structured its case to avoid spillover of prejudicial evidence.

33. Criminal Law ⇐1149

Standard of review of denial of motion for a bill of particulars is abuse of discretion.

34. Indictment and Information ⇐121.2(1)

Trial court did not abuse its discretion in denying defendant's motion for a bill of particulars, notwithstanding defendant's claim that lack of such a bill impeded his ability to plead double jeopardy, as defendant did not explain what other crimes in which he was involved could form basis of double jeopardy claim; moreover, although defendant alleged that introduction of evidence pertaining to marijuana transaction in which he was involved unfairly prejudiced him, defendant knew prior to trial that evidence would form part of case, giving him an adequate time to respond. U.S.C.A. Const.Amend. 5.

35. Criminal Law ⇐1159.2(5)

In reviewing contention that jury had insufficient evidence to convict defendant, Court of Appeals must determine whether there is substantial evidence, viewed in light most favorable to Government, to uphold jury's decision.

36. Conspiracy ⇐44½

Evidence in prosecution of individuals involved in large-scale narcotics distribution conspiracy, including defendant's receipt of three ounces of speed over a short period of time, coupled with statements from taped conversations, permitted jury to infer that defendant was distributing drugs, as opposed to possessing drugs only for personal use. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

37. Conspiracy ⇐47(12)

Evidence in prosecution of individuals involved in large scale narcotics distribution conspiracy, including fact that defendant received four ounces of speed and returned shortly thereafter with $1,800, and that defendant had relationship with cocaine supplier, supported jury conclusion that defendant was actively involved in conspiracy to distribute drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

38. Conspiracy ⇐40.1

Knowledge of all particular aspects, goals, and participants of a conspiracy is not necessary to sustain a conspiracy conviction.

39. Conspiracy ⇐47(12)

Evidence in prosecution of individuals involved in large-scale narcotics distribution conspiracy, including taped telephone conversations, lactose seized during defendant's arrest and quantities of cocaine he received, was sufficient to prove that defendant knew he was part of larger drug operation. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

40. Conspiracy ⇐47(12)

Evidence in prosecution of individuals involved in large-scale narcotics distribution conspiracy, including fact that defendant lived for several weeks at address which was clearing house for conspiracy's operations, was sufficient to show that defendant was involved in conspiracy's marijuana importation scheme. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

41. Telecommunications ⇐515

Probable cause was evident on face of affidavit in support of wiretap, where affidavit detailed activities occurring at address used as clearing house by large-scale narcotics distribution conspiracy, discovered through several informants and a number of uncover drug purchases. 18 U.S.C.A. § 2518(3).

42. Telecommunications ⇐510

Government need not exhaust all possible traditional investigative techniques prior to applying for a wiretap.

43. Telecommunications ⇐520

Government's efforts to minimize nonpertinent conversations in wiretap of address used as clearing house for large-scale narcotics distribution conspiracy were acceptable, considering that conspiracy involved large number of individuals, and that participants took care to speak in coded language.

44. Telecommunications ⇐512

Wiretap was not illegal because it was authorized by Assistant Attorney General of the Tax Division, rather than Assistant Attorney General in charge of Criminal Division. 18 U.S.C.A. § 2516(1).

45. Telecommunications ⇐517

Wiretap of address used as clearing house for large-scale narcotics distribution conspiracy was not improper because Government failed to name particular defendant as target in its application for second extension of wiretap, where information necessary to name defendant as target, such as transcripts of telephone calls involving defendant, was not available to Government until after application was filed.

46. Conspiracy ⇐45

Trial court did not err in refusing, on relevance grounds, to permit defendant to read into evidence parts of agent's affidavit that formed basis for wiretap, where defendant sought to read portions of affidavits naming targets of wiretaps, alleging that because his name was unmentioned in applications for wiretaps he was not involved in drug conspiracy, since initial suspicions of Government that defendant was not part of conspiracy were disproved by subsequent investigation.

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47. Criminal Law ⇐438.1

Trial court did not err by admitting into evidence transcripts of recorded conversations obtained by wiretap, as transcripts were a useful aid to jurors; moreover, judge instructed jury that tape recording controlled over transcript in case of error or ambiguity.

48. Criminal Law ⇐1134(8)

Where issue turns on statutory construction involving interpretation and application of legal precepts, standard of review is plenary.

49. Criminal Law ⇐822(1)

In reviewing particular jury instruction, Court of Appeals must determine whether charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits issues in case to jury.

50. Commerce ⇐82.73

A defendant need not commit or agree to commit personally predicate acts of racketeering to be found guilty of a RICO conspiracy. 18 U.S.C.A. § 1961 et seq.

51. Conspiracy ⇐43(1)

Trial court did not err in not dismissing counts charging use of telephone to facilitate a narcotics conspiracy which failed to name particular controlled substance, where indictments specified exact time of telephone communication on a particular date and persons involved in communication, and set forth specific offense that was facilitated by use of telephone, i.e., conspiracy to distribute and possess with intent to distribute controlled substances. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 403(b), 406, 21 U.S.C.A. §§ 843(b), 846.

Joel Jay Reinfeld, Hackensack, N.J., for appellant Adams.

Judd Burstein (argued), New York City, for appellant DiDonato.

Louis F. Sette, Ridgewood, N.J., for appellant Hairston.

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Frank D. Angelastro, Newark, N.J., for appellant Alongi.

Mark J. Treacy, Elmwood Park, N.J., for appellant Viscito.

Michael C. Gaus (argued), Concilio & Gaus, Newton, N.J., for appellant Mustacchio.

Donald T. Smith, Elizabeth, N.J., for appellant Brooks.

George B. Campen (argued), Farmer & Campen, Union City, N.J., for appellant Gallicchio.

Victor Ashrafi (argued), Ralph A. Jacobs, Chief, Appeals Division, U.S. Attorney's Office, Newark, N.J., for appellee

Before ALDISERT, Chief Judge, SLOVITER, Circuit Judge, and MANSMANN, District Judge.*

OPINION OF THE COURT

ALDISERT, Chief Judge.

This case presents a host of issues arising from the prosecution of a number of individuals involved in a large scale narcotics distribution conspiracy. Of the 46 individuals indicted for participation in the conspiracy, ten defendants went to trial before a jury. The jury convicted the eight appellants before us on a variety of charges, including violating 21 U.S.C. § 846 by conspiring to "distribute and possess with intent to distribute quantities of narcotic drug controlled substances and controlled substances," (count 4); participating in a RICO conspiracy and committing a substantive RICO violation (counts 1 and 2); and use of a telephone to facilitate the narcotics conspiracy in violation of 21 U.S.C. § 843(b) (counts 25, 31, 56, and 59).

Appellants raise a multitude of issues on appeal, covering nearly every aspect of the trial. We affirm in all respects, and will address appellants' arguments seriatim.[1]

* Honorable Carol Los Mansmann, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

1. Pursuant to F.R.App.P. 28(i), appellants adopted by reference all arguments made by other appellants that could pertain to them.

I.

The jury convicted the eight appellants of narcotics related charges arising out of a conspiracy operating under the auspices of a purportedly charitable organization, Concern for the Handicapped. The organization was supervised primarily by Nicholas "Nicky Boy" Valvano and his lifelong friend, Stanley Buglione. Although the charity sponsored events that seemingly benefitted the elderly and the handicapped, the main purpose of the organization was the distribution of narcotics.

A social club rented by the organization, at 79 Davenport Avenue, became the clearinghouse for the conspiracy's operations. Appellants, all participants in the organization, trafficked in such drugs as cocaine, speed, and quaaludes. The chain of distribution stretched through several counties in New Jersey and into New York State. Appellants participated in the conspiracy in several ways, including directly buying and selling drugs for the organization, acting as middlemen in the sale of drugs to Concern for the Handicapped, and themselves supplying drugs to the organization.

The primary evidence introduced by the government at trial included transcripts of numerous narcotics-related telephone conversations obtained through wiretaps. The government also relied on the testimony of two key members of the conspiracy, Buglione and Albert "Moose" Suppa. On the basis of this evidence, the jury convicted all eight appellants. We now turn to the contentions raised by appellants in this appeal.

II.

Appellants' main contention is that the district court erred in admitting into evidence the statements of Valvano, a coconspirator. They contend that the government failed either to demonstrate the unavailability of the coconspirator or produce him at trial, as required by the confrontation clause, and therefore the statements could not be admitted. Because resolution of this issue involves the interpretation and application of legal precepts our standard of review is plenary. *Universal Minerals v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir.1981).

[1, 2] At the outset, we note that the district court correctly determined that to admit the coconspirator's statements, it must rule both that the statements have the required indicia of reliability, *see United States v. Ammar*, 714 F.2d 238, 256 (3d Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983), and that the coconspirator is unavailable. DiDonato App. at A183. The district court, however, based its finding of unavailability on the government's assertion that Valvano would not testify truthfully if he took the stand. *Id.* at A184. The credibility of a witness is not a proper ground for finding him to be unavailable for purposes of the confrontation clause. Notwithstanding this ruling, we still must affirm the judgment of the district court if the decision is correct, regardless of the correctness of the reasoning leading to that decision. *Myers v. American Dental Association*, 695 F.2d 716, 725 n. 14 (3d Cir.1982), *cert. denied*, 462 U.S. 1106, 103 S.Ct. 2453, 77 L.Ed.2d 1333 (1983). A careful examination of the record in this case convinces us that the government did meet the unavailability requirement.

[3] *United States v. Inadi*, 748 F.2d 812 (3d Cir.1984), established the constitutional requirements for the admission of statements of a coconspirator. *Inadi* requires that the coconspirator must be unavailable or be produced at trial, but permits the government to prove unavailability in a number of ways. *Id.* at 819. One of the ways in which a coconspirator may become unavailable is by claiming his fifth amendment privilege. This is precisely what Valvano did. Although Valvano did not take the witness stand in open court, he did appear before the court in chambers, in the presence of government and defense lawyers. A reporter present recorded the entire proceedings except when Valvano and his lawyer conferred privately. Valvano's lawyer participated by speaker phone, and at the direction of the court, entered his appearance in the case as Valvano's lawyer.

At the beginning of the proceedings in chambers, the court announced:

> The purpose of this is to inquire whether or not Mr. Valvano is available to testify in this case, either on behalf of defendants or on behalf of the government.

DiDonato App. at A171.

In addition, the court later explained:

> Let's turn to the problem in hand, which is the question of the extent to which the government's witnesses, Buglione and Suppa, can testify as to conversations of co-conspirators under the evidence rule and under the confrontation clause....

Id. at A177-78. Thus, there is no question that the court conducted an inquiry as to the availability of Valvano.[2]

Although we often phrase our discussion only in terms of the points fully developed in the briefs of particular appellants, we have considered the ramifications of these arguments as to all appellants that could be affected by them.

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2. Relevant aspects of the transcript follow:

> THE COURT: I'm informed that we are going to get a call at 9:30 from Mr. Valvano's attorney.
>
> MS. RUSSELL: That's correct. We have asked the Marshals to produce Mr. Valvano this morning.
>
> THE COURT: And here is Mr. Valvano. Let's find a chair for him.
>
> Good morning.
>
> MR. VALVANO: Good morning.
>
> THE COURT: Okay. Mr. Valvano is also present, and we are getting a call, I understand, at 9:30 from Mr. Valvano's attorney, who got notice only very late yesterday afternoon or early evening that we would like to have him here.
>
> He had a prior court commitment this morning so he could not be here.
>
> What I want to do is to discuss the status of Mr. Valvano's testimony, whether he would testify if called, just to get the facts in this regard.
>
> That, Mr. Valvano, is what we are going to do. I don't want to have you say anything until your attorney is on the speaker phone and can advise what we can do.

DiDonato App. at A166-67.

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The trial judge, within the "ambit of discretion" reserved to him, *Inadi*, 748 F.2d at 820 n. 7, was not required to rule on Valvano's unavailability only after Valvano had taken the witness stand in open court and claimed his privilege. In view of Valvano's appearance before the court in chambers and his assertion to the court that he would not testify—assertions addressed to the court on the record in the presence of all counsel—the confrontation clause does not require the futile act of calling Valvano to the stand in open court to testify only to have him refuse.

Nor does the recent case of *United States v. Caputo*, 758 F.2d 944 (3d Cir. 1985), command a different result. In *Caputo*, we found the government had not met its burden on the unavailability issue because unavailability was based on the *government's* assertion that the coconspirator would invoke his fifth amendment privilege. *Id.* at 952. Here, however, the coconspirator himself testified at an in chambers hearing that he would claim his privilege. These assertions clearly were sufficient evidence on which the trial court could have found Valvano to be unavailable and thus correctly have admitted his hearsay statements.[3]

[4, 5] Finally, appellants maintain that because the confrontation clause requires the government to make a "good faith effort" to obtain a witness' testimony, *Inadi*, 748 F.2d at 819, the government should have granted Valvano use immunity. Not only is this argument without merit, but appellants raise the issue in a tangential manner, never indicating whether the argument was presented to the trial court. *See* DiDonato Reply Brief at 5 n. 3. The decision to grant immunity is reserved to the discretion of the executive branch. *See In re Grand Jury Matter*, 673 F.2d 688, 696

THE COURT: Put your appearance on the record.
MR. WEICHSEL: John L. Weichsel, 79 Main Street, Hackensack, appearing for Nicholas Valvano.
THE COURT: Mr. Valvano is sitting here next to me and to the court reporter, so he and you are, if not in visible contact, you're in verbal contact.
MR. WEICHSEL: Fine.
THE COURT: The purpose of this is to inquire as to whether or not Mr. Valvano is available to testify in this case, either on behalf of defendants or on behalf of the government.
MR. WEICHSEL: In this case?
MR. VALVANO: Yeah.
MR. WEICHSEL: Can Mr. Valvano hear me?
MR. VALVANO: Yeah.
MR. WEICHSEL: In this case we had discussed over at the Metropolitan Correctional Center whether you were willing to testify for either the government or the defense in this case.
MR. VALVANO: Let me just brief you on something, John, all right?
MS. RUSSELL: Between the two of them?
MR. WEICHSEL: It was my understanding that you did not want to testify for either the government or the defense.
Is that correct, Mr. Valvano?
MR. VALVANO: Yeah, I ain't talked to nobody. I don't even know what I'm doing here.

Id. at A171–72.

(The Court, all counsel and the court reporter leave chambers.)
(The Court, all counsel and the court reporter return to chambers.)
THE COURT: All right. You're back?
MR. WEICHSEL: Yes, I'm back.
Mr. Valvano and I have had a discussion, and based upon that discussion Mr. Valvano does not wish to testify for either the government or the defense. And it is his desire not to testify.
THE COURT: All right. That might be his desire. But suppose he's subpoenaed?
MR. WEICHSEL: If he's subpoenaed before sentencing, he would exercise his constitutional right not to testify.
THE COURT: What if he's subpoenaed after his sentencing?
MR. WEICHSEL: I don't think that that right extends after sentencing.
THE COURT: I don't think it does.
MR. WEICHSEL: No. Obviously if he's subpoenaed after sentencing by either side, he would have to testify. But he does not wish to testify and if it is done before sentencing, he will exercise his constitutional rights.
THE COURT: All right.

Id. at A174–75.

3. Judge Sloviter adheres to the position expressed in her dissent in *Caputo* that the confrontation clause does not require that a declarant be shown to be unavailable if he is not produced at trial as a condition for the admissibility of a coconspirator statement. She agrees, however, that if a showing of unavailability is necessary, it was adequately made in this case.

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(3d Cir.) (Sloviter, J., concurring), *cert. denied sub nom. United States v. Doe*, 459 U.S. 1015, 103 S.Ct. 375, 74 L.Ed.2d 509 (1982). Moreover, because the trial court had no opportunity to address this issue, we decline to reach it here. *See Newark Morning Ledger Co. v. United States*, 539 F.2d 929 (3d Cir.1976).

III.

[6] Appellants moved for a new trial under F.R.Crim.P. 33 based on newly discovered evidence about a prior crime of Stanley Buglione, one of the government's key witnesses. Our standard of review for the denial of a Rule 33 motion is abuse of discretion. *United States v. Iannelli*, 528 F.2d 1290, 1292 (3d Cir.1976).

[7] In moving for a new trial on the ground of newly discovered evidence, appellants must meet a well established five part test:

> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Id.; United States v. Meyers, 484 F.2d 113, 116 (3d Cir.1973). As correctly held by the court below, appellants are not entitled to a new trial because they could meet only the first two parts of the test.

[8] The evidence pertaining to a jewel robbery in which Buglione participated clearly was newly discovered evidence, coming to light only after the conclusion of the trial, and was not available during trial through no fault of appellants. The evidence, however, was merely impeaching and almost certainly would not produce an acquittal. Buglione admitted to a minimum of twenty instances of unsavory conduct, ranging from infidelity to his wife to a conviction of misconduct in office while a public official. Government's brief at 31–32. If this evidence did not convince the jury to doubt Buglione's credibility, evidence of another relatively mundane crime would not be the "straw that broke the camel's back." Even if this evidence could convince the jury to disregard Buglione's testimony, the other evidence in the case was more than sufficient to sustain a finding of guilt.

[9, 10] Additionally, appellants Alongi and Mustacchio base their motion for a new trial on the theory that the government's failure to disclose Buglione's participation in the robbery violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under *Brady*, a new trial is justified when "the evidence is material either to guilt or to punishment...." *Id.* at 87, 83 S.Ct. at 1196. In *United States v. Ozman*, 740 F.2d 1298, 1313 (3d Cir.1984), we held that:

> [D]efense counsel has a substantial basis for claiming the materiality of evidence impeaching the truthfulness of a prosecution witness when, viewed prospectively as the prosecutor views the evidence before trial, the testimony of the witness incriminates the defendant, and the impeaching evidence significantly impairs the incriminatory quality of that testimony.

For the reasons discussed above, however, a new trial is not merited because the government's failure to disclose the information on Buglione was harmless.

IV.

[11] Appellants contend that the district court erred in admitting into evidence weapons seized from various members of the conspiracy. Appellants maintain that, under F.R.Evid. 403, the weapons were more prejudicial than probative. We review the Rule 403 decision under an abuse of discretion standard. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269–70 (3d Cir.1983).

[12] Weapons may be as much "tools of the trade" as the most commonly recognized narcotics paraphernalia. *United*

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States v. Picklesimer, 585 F.2d 1199, 1204 (3d Cir.1978). The police seized the weapons from the homes of Thomas DiDonato, a major supplier of cocaine to the conspiracy, and Glenn DelaMotte, a member of the inner circle of the narcotics conspiracy. The weapons thus had probative value as evidence of the large scale of the conspiracy and the type of protection the conspirators felt they needed to protect their operation. Appellants, however, urge that the types of weapons seized, including an Uzi submachine gun, were overly prejudicial because they were "weapons of extreme violence and looked like they were taken from the set of a Hollywood gangster movie." Alongi brief at 55. Weapons, of whatever kind, usually will suggest a picture of violence to a jury. "Moreover, it is well known that continued exposure to even emotion-arousing objects tends to reduce their effect." *United States v. Cahalane*, 560 F.2d 601, 607 (3d Cir.1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). In view of the length of the trial, any prejudicial effect from the weapons is merely speculative.

[13] Appellants also urge that the trial court erred by not giving a limiting instruction on the relevance of the weapons. None having been requested, and appellants not having suffered prejudice from the lack of an instruction, we hold that the district court did not err.

[14] More particularly, John Hairston argues that the lower court erred in not suppressing the .38 caliber handgun seized from his home at the time of his arrest. The district court concluded that police lawfully had seized the weapon in a valid search incident to arrest or as part of a consent search. In reviewing a suppression motion, "the district court's finding of narrative or historical facts are measured by the clearly erroneous test; as to the legal component of its conclusion, however, this court has plenary review." *United States v. Mitlo*, 714 F.2d 294, 296 (3d Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 550, 78 L.Ed.2d 724 (1983).

In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Supreme Court validated a search of the area into which an arrestee might reach for a weapon made incident to arrest. As the Court stated: "A gun on a table or *in a drawer* in front of one who is arrested can be ... dangerous to the arresting officer...." *Id.* at 763, 89 S.Ct. at 2040 (emphasis supplied). Accordingly, we find appellant's distinction that the gun seized was from a dresser near to him, but to the side, to be meaningless. The district court's finding that the weapon was lawfully seized incident to arrest not being clearly erroneous, we uphold its decision not to suppress the weapon. We also need not consider appellant's argument that he did not consent to the search.

V.

Appellants also allege a variance between the proof and the indictment. Appellants argue that the government's proof evidenced multiple conspiracies, rather than the single conspiracy charged in the indictment.

[15] The precepts guiding our review of the variance argument are familiar. Our polestar is to determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir.1980) (quoting *Burks v. United States*, 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978)), *cert. denied*, 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981). *See also United States v. Fischbach & Moore*, 750 F.2d 1183 (3d Cir.1984). Additionally, *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), sets forth the two-pronged test appellants must meet to succeed in this specific contention: (1) that there was a variance between the indictment and the proof and (2) that the variance prejudiced some substantial right of the defendants. *Id.* at 752, 756, 66 S.Ct. at 1241, 1243.

[16] The government, however, introduced more than sufficient proof of a sin-

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a conspiracy. The conspiracy operated out of 79 Davenport, under the auspices of Concern for the Handicapped. The common goal of the conspiracy was the sale of drugs for profit; each separate drug transaction was a step in achieving that common goal. As we held in *Fischbach & Moore*, when dealing with an antitrust conspiracy comprised of at least fourteen separate instances of price fixing, the separate transactions were an integral part of the overall conspiracy. 750 F.2d at 1190. To separate the drug conspiracy at issue into multiple conspiracies pertaining to each drug transaction would not only be artificial, but would distort the common goal of the conspiracy.

Because we hold that appellants did not prove a variance between the proof and the indictment, we need not consider the prejudice prong of *Kotteakos*.

VI.

Appellants Mustacchio and Viscito argue that their convictions should be reversed because count four of the indictment, charging appellants with conspiracy to distribute narcotics, listed the narcotics involved, but did not list marijuana. Yet, evidence of marijuana transactions was introduced during the trial. Because appellants' claim is without merit, we affirm their convictions.

Initially, we must determine whether appellants have shown an amendment of the indictment or a variance between the proof and the indictment. As defined by Judge Skelly Wright:

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. *Gaither v. United States*, 134 U.S.App.D.C. 154, 413 F.2d 1061, 1071 (1969).

United States v. DeCavalcante, 440 F.2d 1264, 1271 (3d Cir.1971). Following the above definitions, appellants have proved a variance. The charging terms of the indictment remained constant—conspiracy to distribute narcotics. The proof, however, included evidence of appellants' involvement with an additional drug not listed in the indictment.

[17, 18] Having shown the variance, *Kotteakos* requires that appellants also show prejudice to their substantial rights. In making such a determination, we usually focus upon two issues: (1) potential for a double jeopardy problem and (2) unfair surprise to appellants that adversely affected their defense. *United States v. Somers*, 496 F.2d 723, 746 (3d Cir.), *cert. denied*, 419 U.S. 832, 95 S.Ct. 56, 42 L.Ed.2d 58 (1974). Neither appellant raises a substantial argument that a double jeopardy problem exists. Nor does either appellant allege that his defense was prejudiced. Knowledge that the marijuana evidence would be introduced at trial was available to appellants during the pretrial phase. Appellants thus being unable to show prejudice, we find the variance to be harmless.

VII.

[19] Appellant Viscito argues that he was denied a fair trial because the district judge restricted cross-examination about a witness' involvement with the Witness Protection Program. The extent of cross-examination, however, is within the sound discretion of the trial court. A restriction will not constitute reversible error unless it is so severe as to constitute a denial of the defendant's right to confront witnesses against him and it is prejudicial to substantial rights of the defendant. *Government of the Virgin Islands v. Bryden*, 626 F.2d 310, 313 (3d Cir.1980).

[20] Appellant Viscito, in fact, did cross-examine Suppa about his participation in the Witness Protection Program. 2 Govt.App. at 395. Appellant thus was able to make his crucial point, that of impeaching the witness. As the trial court found, any further cross-examination would im-

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pugn Suppa's credibility only marginally, while posing the danger that the other defendants would be severely prejudiced by a discussion of the threats that necessitated Suppa's joining the program. The trial judge not having abused his discretion, we find no error.

VIII.

Appellant Alongi objects to the admission of several exhibits of evidence on various grounds. All of Alongi's arguments, however, are without merit.

[21, 22] Alongi first argues that the trial court erred in admitting three exhibits of documents because the government had not pre-marked the evidence as the court's discovery order required. In regard to discovery matters, the district court's decision is reviewed under an abuse of discretion standard. *United States v. Liebert*, 519 F.2d 542, 547 (3d Cir.), *cert. denied*, 423 U.S. 985, 96 S.Ct. 392, 46 L.Ed.2d 301 (1975); F.R.Crim.P. 16(d)(2). Because the admission of the evidence did not prejudice appellant, the trial court did not abuse its discretion in admitting it.

The evidence corroborated the government's theory that Alongi introduced Buglione to "Richie," a primary source of cocaine for the conspiracy. Even though the defense had notice of the exhibits only on the day the government introduced them, the trial court found the defense had adequate time to respond to the evidence. This is especially true because the exhibits were only corroborative. Alongi argues that he was prejudiced because in his opening he referred to the lack of physical evidence against him. The reference, however, was only minor and was not such an integral part of the opening as to cause appellant any prejudice.

[23] Appellant also contends that parts of Buglione's testimony relating to their initial meeting and three taped telephone conversations between Alongi and Valvano were irrelevant. Because the F.R.Evid. 402 relevancy decision implicates the interpretation and application of legal precepts, our review is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269 (3d Cir.1983).

[24] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F.R.Evid. 401. Buglione's testimony was relevant to demonstrate Alongi's connection to the conspiracy and to prove that he was instrumental in procuring a source of cocaine for the conspiracy. Likewise, the taped conversations were relevant because they showed Alongi's connections with Valvano, one of the ringleaders of the conspiracy.

IX.

[25] Appellants Gallichio and Adams argue that the district court incorrectly denied their motions for a mistrial on the ground of prosecutorial misconduct. In evaluating the prosecutor's conduct, we must decide "whether [his] remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights." *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983). A conviction will be reversed "only in those situations in which prejudice inures to the defendant from the challenged improprieties." *United States v. Somers*, 496 F.2d 723, 737 (3d Cir.), *cert. denied*, 419 U.S. 832, 95 S.Ct. 56, 42 L.Ed.2d 58 (1974). In the context of the entire trial, the prosecutor's remarks, if improper at all, were either trivial or could have been blunted by a curative instruction that appellants did not request.

[26] Gallichio contends that the prosecutor should not have inquired whether a witness testified for Gallichio because he was afraid.[4] This question represented a

4. The prosecutor initially twice asked the witness whether he knew of Gallichio's "reputation." Gallichio's counsel objected to these questions, and the trial court sustained the objections. After a sidebar conference, the court permitted the prosecutor to ask the witness if he was testifying because he was intimidated, and required the prosecutor to take the witness' answer as it stood, without benefit of follow-up questioning.

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time honored means of trying to impeach the witness by showing that he had been intimidated into testifying favorably for the defense. Additionally, any reference to this subject in the prosecutor's closing was an acceptable reference to the government's theory of why the witness testified favorably—a theory the jury could accept or reject based on the witness' answer to the question.

[27] Adams argues that the reference in the prosecutor's closing to Norma Webber, a woman with a criminal conviction, as an associate of Adams mandates reversal. The prosecutor made only a single reference to Ms. Webber in his closing. The reference was not protracted and the judge responded to an objection by saying he would strike all reference to Ms. Webber. Although the judge gave no cautionary instruction, none was requested. Considering the trial as a whole, this slight reference to Ms. Webber did not prejudice appellant's rights.

X.

[28, 29] Appellant Mustacchio argues that the district court abused its discretion by sentencing him to an excessively high prison term and sentencing him in a disparate fashion from the other defendants involved in the conspiracy. In the usual criminal case, our review of a sentence imposed by the district court is extremely circumscribed. *United States v. Felder*, 706 F.2d 135, 137 (3d Cir.1983). *But see* Sentencing Reform Act of 1984, Pub.L. No. 98-473, § 213(a), 98 Stat. 1837, 2011 (1984) (to be codified at 18 U.S.C. § 3742(a) (effective Nov. 1, 1986) (will allow review of sentences under limited circumstances after Act's effective date). Generally, if the sentence falls within the statutory maximum, the matter is not reviewable on appeal. *United States v. Dickens*, 695 F.2d 765, 782 n. 26 (3d Cir.1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792, 76 L.Ed.2d 359 (1983). We may review the sentence, however, if there is a showing of illegality or abuse of discretion. *United States v. Fussler*, 453 F.2d 953, 954 (3d Cir.1972). The judge justified Mustacchio's sentence, which was within that prescribed by law, on a number of grounds, including his "deep involvement" with the ringleaders of the conspiracy, his previous convictions, and his unwillingness to move away from a life of crime. 2 Mustacchio App. at 481–82. Based on this reasoning, the judge did not abuse his discretion.

Moreover, these reasons explain the difference in the sentences meted out to the other defendants. Although convicted on the drug distribution charge, or other crimes as serious, the judge found the other defendants' involvement in the conspiracy to be not as extensive and their potential for rehabilitation more promising. Thus, the difference in sentences signifies no abuse of discretion on the part of the trial court.

XI.

[30] Appellants Mustacchio and Gallichio also urge that the district court should not have denied their motions for severance. Our standard of review is whether the lower court abused its discretion. *United States v. DiPasquale*, 740 F.2d 1282, 1293 (3d Cir.1984). Under this standard, appellants bear a heavy burden in challenging the denial of a severance. *Id.*

[31] Appellants argue that a severance was required because only a small portion of the evidence related to them. However, "[a] defendant is not entitled to severance merely because the evidence against a co-defendant is more damaging than that against him." *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). *See also United States v. Riccobene*, 709 F.2d 214, 226 (3d Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983). Some exacerbating cir-

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istances, such as the jury's inability to mpartmentalize" the evidence, are re- red. *Danskey*, 537 F.2d at 62.

2] Appellants have failed to prove exacerbating circumstances. The dis- t court was careful to sever the affiliat- weapons charges because of the undue udice they might generate. The re- ning charges all fell under the umbrella spiracy operating out of the Concern for Handicapped organization. To the ex- that a single conspiracy was charged, severance was required. *Riccobene*, F.2d at 226. As to the compartmentali- on argument, the government struc- d its case to avoid spillover of preju- l evidence. The government presented evidence relating to appellants' drug sactions in a manner designed to high- t their involvement in the conspiracy. ellants' conclusory allegations of a over effect do not meet their burden justifying a reversal.

XII.

3] Appellant Mustacchio urges that trial court abused its discretion in deny- his motion for a bill of particulars. n, on this issue, our standard of re- is abuse of discretion. *United States Idonisio*, 451 F.2d 49, 64 (3d Cir.1971), *denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.2d 812 (1972). "The denial of a mo- for a bill of particulars does not unt to an abuse of discretion unless the rvation of the information sought leads he defendant's inability to adequately are his case, to avoid surprise at trial, avoid the later risk of double jeopar- *Id.*

4] We cannot say that the district t abused its discretion on the facts of case. Mustacchio argues that lack of a of particulars impeded his ability to d double jeopardy. Yet he does not ain what other crimes in which he was lved could form the basis of a double ardy claim and necessitate a bill of iculars. Additionally, appellant alleges introduction of evidence pertaining to arijuana transaction in which he was involved unfairly surprised him. Yet, appellant knew prior to trial that this evidence would form part of the government's case, giving him an adequate time to respond. Finally, Mustacchio argues that a bill of particulars would have provided information that he needed to prepare his case adequately. Beyond these conclusory statements, however, Mustacchio can point to no specific instance during the trial in which his defense was prejudiced by lack of information. Rather, he identifies times when his defense effort was, at the most, inconvenienced. Such a complaint does not justify reversal.

XIII.

[35] Appellants Adams, Alongi, Brooks and Mustacchio contend that the jury had insufficient evidence to convict them. In reviewing their convictions, we must determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir.1980) (quoting *Burks v. United States*, 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978)), *cert. denied*, 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981). We find appellants' argument to be totally without merit.

The evidence, including the testimony of Suppa and Buglione, two ringleaders of the conspiracy, and a number of tape recorded conversations overwhelmingly demonstrated the existence of a wide ranging conspiracy operating under the auspices of Concern for the Handicapped. The only task remaining for the government was to prove appellants' connection to that conspiracy.

[36] Adams alleges that the evidence was sufficient to show that he possessed drugs only for his personal use, and not for distribution. The evidence of Adams' receipt of three ounces of speed over a short period of time, coupled with statements from the taped conversations, permitted the jury to infer that Adams was distributing drugs.

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[37] Alongi's argument also fails. Evidence of a transaction in which Alongi received four ounces of speed and returned shortly thereafter with $1800 could have formed the basis for the jury's verdict. Moreover, Alongi's relationship with "Ritchie," the cocaine supplier, also could have convinced the jury that Alongi actively was involved in the conspiracy to distribute drugs.

[38, 39] Brooks' argument is much more general. He argues that he had no connection to the conspiracy whatsoever. The taped telephone conversations, however, and the lactose seized during his arrest and the quantities of cocaine he received clearly proved that he was distributing narcotics. Brooks argues, relying on *Kotteakos*, 328 U.S. 750, 66 S.Ct. 1239, that his dealings were solely with Glen Dela-Motte and that he had no connection with the larger conspiracy. Knowledge of all the particular aspects, goals, and participants of a conspiracy, however, is not necessary to sustain a conviction. *Blumenthal v. United States*, 332 U.S. 539, 558, 68 S.Ct. 248, 257, 92 L.Ed. 154 (1947). We find the evidence sufficient to prove Brooks knew he was part of a larger drug operation.

[40] Finally, Mustacchio's contentions also fail. The evidence was sufficient to show that he was involved in the conspiracy's marijuana importation scheme, regardless of whether that transaction was successful. Moreover, Mustacchio lived at 79 Davenport Avenue for several weeks. Thus, he cannot be heard to deny that he did not understand the nature and extent of the conspiracy.

For the above reasons, we reject appellants' sufficiency of the evidence arguments.

XIV.

Appellants Mustacchio and Alongi object, for several reasons, to the use of wiretap evidence at their trial. Appellants' arguments demonstrate no error on the part of the district court.

Mustacchio first contends that the government conducted the wiretaps in violation of 18 U.S.C. §§ 2510–2520. Specifically, he alleges that (1) the government's applications for the wiretaps failed to set forth an adequate showing of probable cause, (2) the government failed to exhaust other avenues of investigation, (3) the government failed to minimize non-pertinent conversations (4) the government failed to obtain proper authority for the wiretaps from the Attorney General, and (5) the government failed to name defendant Mustacchio as a target in the second application for an extension. Because these issues implicate the application and interpretation of legal precepts, our standard of review is plenary. *Universal Minerals*, 669 F.2d at 101–02. We hold that the government adhered to the requirements necessary to operate a wiretap and that the trial court properly admitted the evidence against Mustacchio.

[41] To obtain authorization for an interception of a wire communication, the government must show that: "(a) there is probable cause for belief that an individual is committing, has committed or is about to commit a particular offense enumerated in section 2516 ... (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception...." 18 U.S.C. § 2518(3). Probable cause clearly was evident on the face of the affidavit in support of the wiretap. The affidavit detailed the activities occurring at 79 Davenport Avenue, discovered through several informants and a number of undercover drug purchases.

[42] Likewise, the affidavit explained why normal investigative techniques would be of no avail. The danger involved and the strong possibility of discovery of the investigation merited use of the wiretaps. Moreover, the government need not exhaust all possible traditional investigative techniques prior to applying for the wiretap. *United States v. Vento*, 533 F.2d 838, 850 (3d Cir.1976).

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[43] Although the number of non-pertinent calls intercepted—482—appears on its face to be high, when considered in light of the scope of the conspiracy, the government did minimize the intrusion. The conspiracy not only involved a large number of individuals, but the participants also took care to speak in coded language. Appellant also can demonstrate no pattern to the interception of non-pertinent calls. Because of the variety of voices and transactions involved, the government's efforts at minimizing non-pertinent conversations was acceptable. *Id.* at 853.

[44] Mustacchio also argues that the wiretap was illegal because authorized by Assistant Attorney General Archer of the Tax Division, not the Assistant Attorney General in charge of the Criminal Division. Section 2516(1), 18 U.S.C., permits an Assistant Attorney General to authorize a wiretap. Appellant alleges that there were conditions on Archer's authorization of the wiretap, but introduces no proof that Assistant Attorney General Archer's signature was in violation of these conditions. The authorization for the wiretap is thus presumed to be facially valid. *United States v. Jabara*, 618 F.2d 1319, 1326–27 (9th Cir.), *cert. denied*, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 70 (1980).

[45] Finally, Mustacchio argues that the wiretap was improper because the government failed to name Mustacchio as a target in its application for a second extension of the wiretap. The information necessary to name appellant as a target, such as transcripts of telephone calls involving Mustacchio, was not available to the government until after the application was filed. Moreover, even had this justification for not naming Mustacchio been unacceptable, suppression of taped conversations would not be the proper remedy. *United States v. Donovan*, 429 U.S. 413, 435–37, 439, 97 S.Ct. 658, 671–73, 674, 50 L.Ed.2d 652 (1977).

[46] Appellant Alongi contends that the trial court's refusal, on relevance grounds, to permit him to read into evidence parts of the agent's affidavit that formed the basis for the wiretap was error. We do not so hold. Our review of this relevancy decision is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269 (3d Cir.1983).

Appellant sought to read portions of the affidavits naming targets of the wiretaps, alleging that because his name was not mentioned in the applications for wiretaps he was not involved in the drug conspiracy. The lower court correctly found that this evidence was not relevant. The initial suspicions of the government that Alongi was not part of the conspiracy were disproved by subsequent investigation. Moreover, to permit Alongi to introduce the affidavits would only require the government to enter into an extremely complicated explanation of the wiretap application process in an effort to explain why Alongi was not named initially.

[47] Finally, Mustacchio alleges that the lower court erred by admitting into evidence transcripts of the recorded conversations. Our standard of review is abuse of discretion. *United States v. Cahalane*, 560 F.2d 601, 607 (3d Cir.1977). The trial court clearly did not abuse its discretion in admitting the transcripts. The transcripts were a useful aid to the jurors. Furthermore, the judge instructed the jury that the tape recording controlled over the transcript in case of error or ambiguity. The transcripts thus were properly admitted into evidence.

XV.

Appellants Adams and Viscito attack their convictions under the RICO counts of the indictment. Specifically, Adams charges that the court should have instructed the jury that to convict him of a RICO conspiracy, the jury had to find that he agreed to commit *personally* two or more predicate acts of racketeering. Likewise, Viscito alleges that he could not be convicted of a RICO conspiracy because the jury acquitted him of the RICO substantive offense. His argument also rests on the theory that his conviction was inval-

EDITOR'S NOTE

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ORIGINAL

Nos. 85-5046, 85-5073 and 85-5134

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TYRONE ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY ALONGI, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH MUSTACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment properly charged an offense under 21 U.S.C. 843(b).

2. Whether a defendant may be convicted for conspiracy to violate 18 U.S.C. 1962(c) without agreeing to commit personally at least two predicate offenses.

3. Whether a variance between the indictment and the facts adduced at trial prejudiced petitioner Mustacchio's defense.

4. Whether the district court erred in admitting the statements of a co-conspirator who was unavailable because he claimed his Fifth Amendment privilege.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5046

TYRONE ADAMS, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A229-A247) 1/ is reported at 759 F.2d 1099.

1/ "Pet. App." refers to the Appendix to the Petition in No. 85-5046.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1985. Petitions for rehearing were denied on May 10, 1985, and May 31, 1985. The petitions for a writ of certiorari were filed on July 6, 1985 in No. 85-5046, on July 15, 1985 in No. 85-5073, and on July 27, 1985 in No. 85-5134. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of New Jersey, petitioner Adams was convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activities (RICO), in violation of 18 U.S.C. 1962(d) (Count 1); committing a substantive RICO violation, in violation of 18 U.S.C. 1962(c) (Count 2); conspiring to distribute and to possess with intent to distribute quantities of controlled substances, in violation of 21 U.S.C. 846 (Count 4); and using a telephone to facilitate a narcotics conspiracy, in violation of 21 U.S.C. 843(b) (Counts 25 and 56). Petitioners Alongi and Mustacchio were also convicted on Count 4. In addition, Alongi was convicted on one count of using a telephone to facilitate a drug conspiracy (Count 31). Petitioner Adams was sentenced to concurrent two-year terms of imprisonment on each of Counts 1, 2, and 4 and a suspended sentence on Counts 25 and 56, to be followed by four years' probation. Petitioner Alongi was sentenced to three years' imprisonment on Count 4 to be followed by five years' probation on Count 31. Petitioner Mustacchio received a 14-year term of imprisonment on Count 4. 2/

2/ Five co-defendants, Thomas DiDonato, John Hairston, Michael Viscito, Clifton Brooks and Nicholas Gallicchio were also charged with RICO conspiracy, conspiring to distribute controlled substances, and using a telephone to facilitate a narcotics conspiracy. All of the co-defendants except Michael Viscito were convicted on every charge. Viscito was acquitted on the substantive RICO charge.

The evidence at trial showed that Nicholas Valvano and his friend Stanley Buglione operated a purportedly charitable organization called Concern for the Handicapped. In reality, the main purpose of the organization was the distribution of narcotics. The conspiracy rented a social club, which in time became the clearinghouse for its operations. Petitioners Adams and Alongi participated in the conspiracy by buying and selling "speed" for the organization. Petitioner Mustacchio participated in the conspiracy's marijuana importation scheme (Pet. App. A235, A244).

2. On appeal, petitioner Adams argued, inter alia, that the trial court should have instructed the jury that in order to convict him of RICO conspiracy, the jury had to find that he agreed to commit personally two or more predicate acts of racketeering. Both petitioners Adams and Alongi argued that the telephone facilitation count was insufficient because it failed to name a particular controlled substance. Petitioner Mustacchio argued, inter alia, that there was a prejudicial variance between the indictment and the proof at trial and that the district court improperly admitted co-conspirator hearsay statements.

The court of appeals first observed that the circuits have differed in their analyses of the question of a defendant's personal participation in a RICO conspiracy. It concluded, however, that, in its view, in order to be convicted of RICO conspiracy, a defendant need only agree to the commission of the predicate acts and need not agree to commit the acts himself (Pet. App. A246). It further concluded that the indictment sufficiently advised petitioners of the charges against them (Pet. App. A247).

The court of appeals noted that the indictment charged a conspiracy to distribute certain specified narcotics but did not list marijuana, even though the evidence at trial showed that petitioner Mustacchio participated in marijuana transactions.

However, in the court's view, this variance did not warrant a reversal. Mustaccnio learned before trial that marijuana evidence would be introduced, and therefore his defense was not prejudiced (Pet. App. A240). The court further found that the district court had properly concluded that co-conspirator Nicholas Valvano was unavailable as a witness before admitting his co-conspirator hearsay statements. Valvano appeared before the district court and asserted his Fifth Amendment privilege at a hearing on the admissibility of the statements (Pet. App. A235-A237).

ARGUMENT

1. Petitioners Adams and Alongi first argue (No. 85-5046 Pet. 6-9; No. 85-5073 Pet. 3-7) that the telephone facilitation counts did not adequately apprise them of the charges against them because the counts did not state which particular controlled substances were to be distributed. The court below properly rejected petitioners' arguments.

Counts 25, 31, and 56 specified the exact time and the particular date of the telephone communication and specified the

particular persons that were involved in the conversations. 3/ Hence, the indictment clearly meets the test set forth by this Court in Hamling v. United States, 418 U.S. 87, 117 (1984), that an indictment is sufficient where it "contains the elements of

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3/ Count 25 charged:

> That at approximately 6:21 p.m. on August 30, 1983, at Newark, in the District of New Jersey, the defendants
>
> NICHOLAS VALVANO
> a/k/a "Nicky Boy," and
> TYRONE ADAMS
>
> knowingly and intentionally did use and cause to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

Count 56 charged:

> That at approximately 9:23 a.m. on October 24, 1983, at Newark, in the District of New Jersey, the defendants
>
> NICHOLAS VALVANO
> a/k/a "Nicky Boy," and
> TYRONE ADAMS
>
> knowingly and intentionally did use and caused to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

Count 31 charged:

> That at approximately 4:46 p.m. on September 17, 1983, at Newark, in the District of New Jersey, the defendants
>
> NICHOLAS VALVANO
> a/k/a "Nicky Boy," and
> ANTHONY ALONGI
>
> knowingly and intentionally did use and cause to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

the offense charged and fairly informs a defendant of the charge against which he must defend and * * * enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." See also United States v. Miller, No. 83-1750 (Apr. 1, 1985), slip op. 4-5.

Moreover, petitioner's claims are especially meritless in light of the government's submission of a bill of particulars that identified the controlled substances alleged to have been distributed by the co-conspirators (see Pet. App. A224-A226).

United States v. Hinkle, 637 F.2d 1154 (7th Cir. 1981), upon which petitioners rely, is inapposite. As the court of appeals observed (Pet. App. A247), in Hinkle the indictment failed to specify the other party to the conversation, the time when it took place, or which of the six types of acts prohibited by 18 U.S.C. 841(a)(1) were involved. Here, as we have noted, the indictment fairly informed petitioners that particular telephone calls facilitated a conspiracy to distribute a controlled substance.

2. In order to convict a defendant of violating 18 U.S.C. 1962(c), the government must prove that he conducted or participated in the affairs of an enterprise through a "pattern of racketeering activity." A "pattern of racketeering activity" is defined by 18 U.S.C. 1961(5) as two or more acts of racketeering activity. Petitioner Adams, who was convicted of conspiring to violate 18 U.S.C. 1962(c), contends (No. 85-5046 Pet. 9-12) that the trial court erred when it declined to instruct the jury that conviction for that offense requires proof that each conspirator agreed, not only to join the conspiracy, but also to commit two or more predicate offenses personally. Adams claims that the judge should not have limited his

instructions to a description of the elements of 18 U.S.C. 1962(c) and the traditional elements of the crime of conspiracy. The court of appeals disagreed with petitioner and held (Pet. App. A246):

> We now decide that to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts.

The court of appeals' decision is correct and does not warrant further review. Initially, we note that in Adams' case, where the jury found that he had actually committed two predicate acts, "the inference of an agreement to do so is unmistakable." United States v. Carter, 721 F.2d 1514, 1530 (11th Cir.), cert. denied, No. 83-1743 (Oct. 1, 1984), quoting United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978). Hence, even if the court had incorrectly charged the jury, Adams' convictions on the two predicate acts would have rendered the error harmless. Thus, this case is not an appropriate vehicle for review.

In any event, this Court has recently denied certiorari on this same issue and no different result is warranted here. See United States v. Carter, supra. As we argued in our Brief in Opposition in that case, 4/ it is well established that the crime of conspiracy generally has two elements: (1) an agreement the objective of which is the commission of one or more unlawful acts and (2) the performance by a conspirator of at least one overt act in furtherance of the conspiracy. Braverman v. United States, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator must agree to personally perform the illegal act or acts that constitute the conspiracy's object. On the contrary, a conspirator may be convicted "upon showing sufficiently the essential nature of the plan and [his]

4/ We have furnished petitioner Adams with a copy of that Brief In Opposition.

connections with it." Blumenthal v. United States, 332 U.S. 539, 557 (1947).

In enacting the conspiracy provision of the RICO statute, Congress manifested no intent to alter this established principle. Far from imposing such an additional restriction on the prosecution, Congress mandated that the RICO statute be liberally construed to achieve its objective of combatting organized crime. Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576, 588-589 (1981).

In arguing that RICO conspiracy does contain this additional element, Adams relies on First, Second, and Fifth Circuit cases. However, none of those cases reversed a defendant's conviction on the ground that, even though he had agreed to participate in the affairs of an enterprise that contemplated the commission of two or more acts of racketeering, he had not personally agreed to commit two predicate acts himself. Thus, the somewhat imprecise language in those opinions on which Adams relies carries little weight.

In United States v. Elliott, 571 F.2d 880, 900-905 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1978) (see Pet. 11), the court held merely that the indictment charged a single conspiracy to violate 18 U.S.C. 1962(c) and not multiple conspiracies, as the defendants claimed. The court stated (571 F.2d at 902 (emphasis added)) that "[t]he gravamen of the conspiracy charge in this case * * * is that each [conspirator] agreed to participate * * * in the affairs of the enterprise by committing two or more predicate crimes." In making this statement, the court was describing the facts alleged in that case, not the requirements of RICO conspiracy. The court added (id. at 903 (emphasis in original)) that a conspiracy to violate Section 1962(c) requires proof of "an agreement to participate * * * in the affairs of an enterprise through the commission of two or more predicate crimes." This statement is ambiguous. In our view, it may and

should be read to mean only that a conspirator must agree to the commission of two or more predicate crimes, not that he will personally commit them.

In United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981) 5/ (see Pet. 11), the court stated that conviction for conspiracy to violate 18 U.S.C. 1962(c) requires proof that the defendant agreed "to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes." The court then reversed a conviction for conspiracy to violate Section 1962(c) where the evidence did not show that the defendant had agreed to the commission of more than one predicate crime (648 F.2d at 396). The court did not hold that the government was required to prove that the defendant agreed to personally commit two or more predicate crimes.

Similarly, in United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, No. 83-2036 (Oct. 1, 1984) (see Pet. 11), the jury was instructed that it must find, to convict on a RICO conspiracy, that the defendant himself agreed to commit two or more predicate acts. After the Second Circuit concluded that one of the predicate acts--a gambling conspiracy--was legally insufficient, it dismissed the RICO conspiracy count because the jury had only found that he had agreed to commit one predicate act. In other words, the jury did not find that the defendant had agreed to the commission of more than one predicate crime. Finally, in United States v. Winter, 663 F.2d 1120, 1135-1138 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983) (see Pet. 11), the First Circuit relied on dicta in Elliott for the proposition that a RICO conspiracy count must charge that each

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5/ This Court denied the petitions for certiorari challenging the criminal convictions in that case (456 U.S. 943 (1982)). The Court affirmed the judgment of forfeiture. Russello v. United States, supra.

defendant agreed to personally commit two or more predicate crimes. But, as we have argued, Elliott should be read to mean only that a conspirator must agree to the commission of two or more predicate crimes, not that he will personally commit them.

In sum, in none of the cases cited by Adams reversed a conviction on the ground that even though the defendant agreed to participate in the affairs of an enterprise that he knew would commit two or more racketeering acts, he did not agree to personally commit the acts. Since Adams' argument is plainly inconsistent with fundamental principles of conspiracy law, there is no need to review the correct result reached here by the lower courts.

3. Petitioner Mustacchio further argues (No. 85-5134 Pet. 6-11) that because his efforts to import marijuana were not expressly alleged in the indictment, his Fifth Amendment right not to be tried for a felony except upon indictment by a grand jury was violated. 6/ Relying on Stirone v. United States, 361 U.S. 212 (1960), petitioner argues that the facts presented at trial were "broader" than the facts presented to the grand jury. The court below properly rejected petitioner's claim.

As this Court most recently set forth in United States v. Miller, No. 83-1750 (Apr. 1, 1985) at slip op. 6, "an indictment may charge * * * the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set forth in the indictment, the right to a grand jury is not normally violated by

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6/ Count 4 charged that from May 1983 until November 22, 1983 petitioner and 45 other co-defendants conspired to distribute and to possess with intent to distribute quantities of controlled substances, in violation of 21 U.S.C. 841(a)(1). It further alleged that as part of the conspiracy, the defendants would distribute cocaine, dilaudid, methamphetamine and diasepem (Pet. A17). After co-defendants Suppa and Beglione pleaded guilty and agreed to testify for the government, the government informed petitioner during the course of pretrial motions that the two co-defendants would testify concerning marijuana importation that occurred during the charged conspiracy.

the fact that the indictment alleges * * * other means of committing the same crime." Only when the charges in an indictment are broadened significantly by proof at trial which alters the essential elements of the crime does a variation between pleading and proof destroy the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Id. at slip op. 9-10.

In the instant case, the court below properly determined that the government's proof at trial did not alter the essential elements of the offense but rather only varied from the indictment in the sense that it involved a controlled substance--marijuana--that was not described in the indictment as a drug the conspirators planned to distribute. See United States v. Ramos, 666 F.2d 469, 476-478 (11th Cir. 1982); United States v. McCrary, 669 F.2d 1308, 1310-1311 (11th Cir. 1983). As the court below noted, Mustacchio did not "raise[ ] a substantial argument that a double jeopardy problem exist[ed]." (Pet. App. A240). Nor did Mustacchio "allege that his defense was prejudiced" since "[k]nowledge that the marijuana evidence would be introduced at trial was available to [Mustacchio] during the pretrial stage" (ibid.). Accordingly, his claim lacks merit.

4. Petitioner Mustacchio finally claims (No. 85-5134 Pet. 11-17) that the district court improperly admitted under the co-conspirator rule (Fed. R. Evid. 801(d)(2)(E)) hearsay statements made by Nicholas Valvano without first correctly determining that they passed muster under the Confrontation Clause. Petitioner argues that the court below improperly relied on Valvano's statement that, if called, he would assert his Fifth Amendment privilege, in finding that Valvano was unavailable as is required by United States v. Inadi, 748 F.2d 812 (3d Cir. 1984), petition for cert. granted, No. 84-1580 (May 28, 1985). According to petitioner, the district court expressly indicated that it would not find Valvano unavailable based upon assertion of his Fifth

Amendment privilege, because, in the district court's view, Valvano could not claim the privilege after sentencing. And, although Valvano had not been sentenced prior to the court's ruling on the confrontation question, the district court offered to sentence him forthwith, in order that the perceived barrier to availability would be removed. Petitioner's argument is unsound.

As is evident from our brief in Inadi, we disagree with the proposition that co-conspirator statements may not be admitted unless the declarant is produced or shown to be unavailable. 7/ But there is no reason to hold the instant case pending disposition of Inadi since the court of appeals here reached a result that was entirely consistent with its prior decision in Inadi. Thus, even assuming that unavailability is required, the court of appeals found that such a showing was made here (Pet. App. A236-A237). Through his attorney, Valvano expressly invoked his Fifth Amendment privilege. Because of this, as the court of appeals found, he was clearly unavailable as a witness.

As Mustacchio notes (No. 85-5134 Pet. 12), the district court stated in passing that Valvano could not invoke his privilege after sentencing. In fact, however, Valvano was not sentenced until after the trial, and in any event, it seems clear that Valvano would have been entitled to invoke his privilege after sentencing in the circumstances of this case. Since Valvano was under suspicion for many other related offenses, chargeable under federal or state law, he could have properly invoked his privilege despite the imposition of sentence.

7/ We have furnished petitioner Mustacchio with a copy of our brief in Inadi.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

TYRONE ADAMS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85–5046. Decided November 4, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

No. 85–5046 presents the issue of the agreement necessary to support a conviction for so-called RICO conspiracy. For his part in a large-scale narcotics distribution scheme, petitioner Adams (hereafter "petitioner") was convicted of both the substantive RICO offense defined by 18 U. S. C. § 1962(c)* and conspiracy to commit this offense. Petitioner requested a jury instruction that he could not be found guilty on the conspiracy count unless the evidence showed that he had personally agreed to commit two acts of racketeering activity. The District Judge refused this instruction. In affirming petitioner's RICO conspiracy conviction, the United States Court of Appeals for the Third Circuit held that, to be convicted of conspiracy to violate § 1962(c), a de-

*In writing the Racketeer Influenced And Corrupt Organizations Act, 18 U. S. C. § 1961 *et seq.*, Congress defined three new substantive offenses, 18 U. S. C. §§ 1962(a), (b), (c), and also made it unlawful to conspire to commit these substantive offenses, 18 U. S. C. § 1962(d). Title 18 U. S. C. § 1962(c), the relevant substantive offense in this case, provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18 U. S. C. § 1961(5) provides that term "pattern of racketeering activity" requires at least two acts of racketeering activity, a term which in turn is defined at 18 U. S. C. § 1962(1).

fendant need only agree to the commission of two predicate acts of racketeering activity, and need not agree to personally commit those acts.

The courts of appeals disagree as to the proper interpretation of 18 U. S. C. § 1962(d), the RICO conspiracy stat . . Some require, as the predicate for conviction under § 1962(d) of conspiracy to violate § 1962(c), an agreement to personally commit two acts of racketeering activity. See, *e. g.*, *United States* v. *Ruggiero*, 726 F. 2d 913, 921 (CA2), cert denied *sub nom. Rabito* v. *United States*, —— U. S. —— (1984); *United States* v. *Winter*, 663 F. 2d 1120, 1136 (CA1 1981), cert denied, 460 U. S. 1011 (1983). Other courts of appeals agree with the Third Circuit that § 1962(d) also makes unlawful an agreement that another violate § 1962(c) by committing two acts of racketeering activity. See, *e. g.*, *United States* v. *Carter*, 721 F. 2d 1514, 1529–1531 (CA11), cert. denied *sub nom. Morris* v. *United States*, —— U. S. —— (1984).

Surprisingly, even the government's interpretation of the RICO conspiracy statute has not been wholly consistent. In *Winter*, *supra*, the government conceded that a count under § 1962(d) of conspiracy to violate § 1962(c) requires proof that the defendant "agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity." 663 U. S., at 1136. In other cases, including this one, the government has argued for the interpretation of § 1962(d) adopted by the Third Circuit.

"The legislative history [of the RICO statute] clearly reveals that [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983). If the Third Circuit's interpretation of § 1962(d) is correct, Congress's intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy. If the Third Circuit's interpretation is incorrect, defendants are being exposed to conviction for behavior Congress did not intend to reach under § 1962(d). I would grant certiorari to resolve the conflict among the courts of appeals.